

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-1507

B
FOS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1507

UNITED STATES OF AMERICA,

Appellant,

—v.—

ANTHONY PROVENZANO, SALVATORE BRIGUGLIO,
HAROLD KONIGSBERG and GEORGE VANGELAKOS,
Defendants-Appellees.

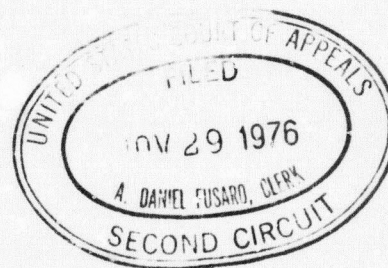
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York
Attorney for the United States
of America*

WILLIAM I. ARONWALD
*Special Attorney
United States Department of Justice*

FREDERICK T. DAVIS
LAWRENCE B. PEDOWITZ
*Assistant United States Attorneys
Of Counsel*



PAGINATION AS IN ORIGINAL COPY

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CRIMINAL DOCKET U.S. District Court

OFFENSE FOR: **BRIGUGLIO, SALVATORE**

OFFENSE NO: **06 22 76 0580 02**

SECTION: **x 0208 1**

OFFENSE CHARGED: **18:1201 (c) Consp. to kidnap.**
18:1201 (a) Consp. to kidnapping.

ORIGINAL COUNTS: **1**
2

U.S. MAG. CASE NO: **A 1**

BAIL - RELEASE

II. KEY DATES & INTERVALS

ARREST OF: **U.S. Custody Began 6-22-76**

INDICTMENT: **Information 6-22-76**

ARRAIGNMENT: **1st Filing**

TRIAL: **Trial Set For**

SENTENCE: **Disposition of Charges**

MAGISTRATE

William I. Aronwald
791-1135

William Buffalino
2801 Trumbull Ave.
Detroit, Michigan 48216
313-963-7711

DATE

PROCEEDINGS

6-22-76 Filed indictment and ordered sealed. B/W ordered.

6-23-76 Indictment ordered unsealed.

06-28-76 Filed appearance bond in the sum of \$100,000.

06-25-76 Filed proceedings sheet from Newark, New Jersey-Hon. Lawrence A. Whipple present-bail fixed in the sum of \$100,000. etc.

07-01-76 Filed deft's motion for discovery, inspection and copying.

07-01-76 Filed Govt's notice and affdvt re: 75 Cr. 1194.

07-01-76 Filed Govt's notice of readiness for trial.

07-01-76 Deft. (atty. William Buffalino) pleads not guilty. Bail cont'd. Limits to include N.J. Fla., Mich. Pa. Knapp, J.

07-02-76 Filed notice of appearance of atty. Wm. Buffalino.

07-20-76 Filed documents forwarded from Dist. of N.J.- (Magistrate's proceedings) docket sheet and temporary commitment-6-24-76 deft. released on bail.

07-23-76 Filed Opinion # 44828... Accordingly, Indictment 76 Cr. 580 is returned to Part I to be assigned to a judge, etc. Bonsal, J. mn

(Over)

Knapp, J.
Knapp, J.

BEST COPY AVAILABLE

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY
(DOCUMENT NO.)			<div>Interim Number (a)</div> <div>Start Date End Date (b)</div> <div>Code (c)</div>
7-27-76	Deft. Konigsberg(atty. Frank A. Lopez, present) Defts. Provenzano, Briguglio and Vangelakos(Their attys. no present) By consent atty. Lopez on behalf of all defts. and attys. For re-assignment. Case assigned to Judge Duffy. Conner, J. Konigsberg produced on a writ.		
7-23-76	Reassignment to Judge Stewart (ent 8-18-76) M/N		
8-25-76	Filed Deft. (H.J. Boitell) Pre-Trial Motions in behalf of Defts. A. Provenzano, S. Briguglio, and G. Vangelakos for Orders granting pre-trial relief... etc.		
8-25-76	Filed Deft. (A.P.) Memo of Law in support of above motion.		
9-02-76	Fld. J. Edwards Affdvt. that Govt. dismiss Konigsberg's motion brought on by the order to show cause dtd 8-23-76.		
9-02-76	Fld. C.A. Butler Affdvt in opposition to deft Konigsberg's motion brought on by order to show cause and in support of the motion made by U.S. to dismiss Konigsberg's motion.		
9-02-76	Fld. J. Somerville Affdvt. that the Court dismiss Konigsberg's motion brought on by the order to show cause dtd 8-23-76		
9-02-76	Fld. A.E. Gunter Affdvt. in opposition to Konigsberg's motion brought on by order to show cause and in support of the motion of the U.S. to dismiss said motion.		
9-02-76	Fld. L. Taylor Affdvt in opposition to deft. Konigsberg's motion brought on by order to show cause and in support of the motion made by the U.S. dismiss konigsberg's motion		
9-02-76	Fld. Govt. Memo to dismiss the deft. Konigsberg's Motion brought on by order to show cause.		
9-2-76	Deft. and atty. present. Motions argued. Trial date is to remain as of Oct. 18, 1976. Stewart, J.		
09-02-76	Filed Transcript of record of proceedings, dated '7-2-76		
9-10-876	Filed transcript of record of proceedings dtd. 6/23/76 held in the USDC, Trenton, New Jersey.		
9-13-76	Filed consent order--ORDERED that the Wisconsin Telephone Co. is directed to maintain all telephone co. records, etc., as indicated. Stewart, J.		
9-15-76	Filed govts. memorandum of law.		
9-15-76	Filed govts. affdt. of wm. Aronwald.		
9-17-76	Filed govts. bill of particulars.		
9-17-76	Filed govts. affdt. and notice of motion for adj. of trial from 10/18/76 to 11/1/76 ret. on: Sept. 21, 1976.		
9-22-76	Filed defts. reply memorandum of law in suport of pre-trail motions.		
9-24-76	PTC held. Trial set for 10/18/76. Stewart, J.		
9-27-76	Filed one sealed envelope ordered sealed and impounded and to be place in vault in cashier's office. Envelope contains transcript of 9/2/76 a 9/21/76. Stewart, J.		

(see Pg. 3)

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

PAGE -3-

DATE	PROCEEDINGS
9-28-76	Filed Govts. supplemental memorandum of law.
9-28-76	Filed Govts. supplemental affdr. of Wm. Apowald.
9-27-76	Filed ltr. stating that the deft. is now represented by: Frederic Rigger, Jr. 106 Valley St. South Orange, New Jersey 07079 (201) 762-3023
9-23-76	Filed memo and on defts. motion dtd. 7/1/76 for discovery--Since deft. has now obtained all relief sought in this motion--it is dismissed. So ordered, Stewart, J. m/n (etc. as indicated)
9-23-76	Filed memo and on defts. motion dtd. 9/23/76 to have atty. Wm. Bufalino withdrawn as defts. counsel--motion granted. So ordered, Stewart, J. m/n
9-23-76	Filed defts. motion to relieve Wm. Bufalino as defts. atty.--see above entry.
10-17-76	Filed Govt's affidavit and notice of motion for an order pursuant to Rule 8(c) of the Criminal Rules of United States District Courts for the Southern District of New York directing the sequestration of the jury during the trial of the above-captioned case. Ret. 11-1-76.
10-26-76	Filed Govt's memorandum of law in support of the above motion.
10-26-76	Hearing held in re. Statute of Limitations - Dec. Res.....STEWART, J.
10-29-76	Filed Opinion #45311 Defts. motion to dismiss the indictment as time-barred is granted.....So Ordered....STEWART, J.
11-3-76	Filed Two Envelopes ordered by the court to be sealed and placed in cashiers (clerks office) vault....So Ordered.....STEWART, J.
11-04-76	Filed Notice of Appeal from the dismissal of the indictment entered on the 29th day of October, 1976.....Mailed notice to deft. & U.S. Atty.
11-9-76	Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A.
11-8-76	Filed letter dated October 19-76, from Govt. to Judge Stewart.
11-8-76	Filed letter dated October 19-76, from Henry J. Boitel to Judge Stewart.
11-8-76	Filed transcript of record of proceedings dtd: October 26-76.
11-17-76	Filed Transcript of Record of Proceedings, dated 8/7/76
11-19-76	Filed Transcript of Record of Proceedings, dated 8/10/76
11-22-76	Filed Transcript of Record of Proceedings, dated 8/14/76
11-24-76	Filed Transcript of Record of Proceedings, dated 10/15/76

A

4

DATE

PROCEEDINGS

1976 Filed Transcript of record of proceedings, dated 9-2-76

1976 Filed Transcript of record of proceedings, dated 9-2-76

06 22 76 0580 03

18:1201 (c) Consp. to kidnap.
18:1201 (a) Consp. to kidnapping.

1
2

1. NAME _____
2. ADDRESS _____
3. CITY _____
4. STATE _____
5. ZIP _____
6. PHONE _____
7. DATE _____
8. SIGNATURE _____
9. PRINT NAME _____
10. PRINT ADDRESS _____
11. PRINT CITY _____
12. PRINT STATE _____
13. PRINT ZIP _____
14. PRINT PHONE _____

II. KEY DATES & INTERVALS

ARREST or		INDICEMENT		ARRAIGNMENT		TRIAL		SENTENCE	
U.S. Custody Warrant	High Risk Date	Information	6-22-76	Ind. Plea	Ind. G. Plea	Ind. G. Plea	Ind. G. Plea	Disposition of Charges	
6-22-76		Indict. Waived		Final Plea	Final G. Plea	Final G. Plea	Final G. Plea	6-22-76	
Summons Served		Superceding Indictment						Convicted	On All Charges
First Appearance	In Charging District							Acquitted	On Lesser Offenses
								Dismissed	W/P W/P

MAGISTRATE

ATTORNEYS

William I Aronwald
791-1135

6-22-76	Filed indictment and ordered sealed.	B/W ordered.	Knapp, J.
6-23-76	Indictment ordered unsealed.		Knapp, J.
06-24-76	Filed affdvt. for w/h/c ad pros. for deft. ret: 7/1/76.		
07-01-76	Filed Govt's notice and affdvt re: 76 Cr. 1194.		
07-01-76	Filed Govt's notice of readiness for trial.		
07-01-76	Deft. (pro-se) plea of not guilty directed by Court.		
	Writ producing deft. ordered cont'd. pending disposition of this case. Frank A. Lopez, Esq. temporarily assigned pending reassignment of counsel by Bonsal, J.		Knapp, J.
07-21-76	Filed Govt's affdvt re: motion for change of venue.		
07-23-76	Filed <u>Opinion # 44826</u> ... Accordingly, Indictment 76 Cr. 580 is returned to Park 1 to be assigned to a judge for all purposes by drawing the name of a judge "by lot" from the "wheel" as provided in the Calendar Rules. Bonsal, J. mn pro-se		

(over)

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OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V. ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	76Cr.580	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
	(DOCUMENT NO.)			Interval Section 3 (a)	Start Date End Date (b)		
7-27-76		Deft. Konigsberg(atty. Frank A. Lopez, present) Defts. Provenzano, Briguglio and Vangelakos(their attys. not present. By consent atty. F. Lopez on on behalf of all defts. and attys. For re-assignment, Case assigned to Judge Duffy. Conner, J. Koingsberg produced on a writ.					
-30-76		Filed affdvt. & order to show cause for an order directing the U.S.M. S.D.N.Y. to collect all legal materials etc and same be delivered to the deft. Etc. Ret. 8-2-76....					
-2-76		Filed order that the Superintendent of Clinton Correctional Facility deliver to the U.S. Marshal the legal and personal effects of defts as indicated**** XXXXX , X. GOETTEL, J.					
-3-76		Filed affdvt. & order to show cause for an order directing the Clerk to draw by lot a judge to preside over the trial...Ret. 8-10-76 11 A.M....Gottel, J...					
8-10-76		Filed Order- that the expenses incurred in obtaining the legal and personal effects of the deft. at the Clinton Correctional Facility in Dannemora, N.Y. be paid for by the marshal.. GOETTEL, J(m/n)					
8-10-76		Filed memo endorsed on OTC filed 8-3-76.. Motion withdrawn on consent... GOETTEL, J.					
-16-76		FLd affid applaaation to correct the record pursuant to Rule 36. FRCP Reassignment to Judge Stewart (ent 8-18-76) M/N					
7-23-76							
8-25-76		Fld. Deft. (H.J Boitell) Pre-Trial Motions in behalf of Defts. A. Provenzano, S. Briguglio, and G. Vangelakos for Orders granting pre-trial relief etc....					
8-25-76		Fld. Deft (A.P) Memo of Law in support of above motion.					
9-2-76		Fld. J. Edwards Affdvt. that Govt. dismiss Konigsberg's motion brought on by the order to show cause dtd 8-23-76					
9-02-76		Fld. C A. Butler affdvt. in opposition to deft Konigsberg's motion brought on by order to show cause and in support of the motion made by U.S. to dismiss Konigsbergs motion.					
9-02-76		Fld. J. Somerville Affdvt. that the Court dismiss Konigsberg's motion brought on by the order to show cause dtd 8-23-76.					
9-02-76		Fld. A.E Gunter Affdvt in opposition to Konigsberg's motion brought on by order to show cause and in support of the motion of the U.S. to dismiss said motion.					
9-02-76		Fld L. Taylor Affdvt. in opposition to deft. Konigsberg's motion brought on by order to show cause and in support of the motion made by the U.S. dismiss Konigsberg's motion					
9-02-76		Fld. Govt. Memo to dismiss the deft. Konigsberg's Motion brought on by order to show cause.					
9-2-76		Deft. and atty. present. Motions argue' Trial date is to remain as of Oct. 18, 1976. Stewart, J.					
		(see page -3-)					

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(see page -3-)

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FINE AND RESTITUTION PAYMENTS

RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS	Date Order or Judgment Noted
7-76	Filed memo end. on motion by Jeff. dated Aug. 16, 1976 to correct transcript pursuant to Rule 36 of criminal procedure--Motion is granted on consent. So ordered, Stewart, J. m/n	
7-76	Filed Transcript of record of proceedings, dated 6-22-76	
9-76	Filed transcript of record of proceedings in the USDC, Trenton, New Jersey dtd. 8/22/76 6/23/76.	
10-76	Filed true copy of order filed on 8/2/76 w/marshal's return.	
13-76	Hearing held. Stewart, J.	
5-76	Filed defts. affdt. and notice of motion to appoint an investigator, etc, ret. on: Sept. 21, 1976 at 10am.	
7-76	Filed govts. bill of particulars.	
17-76	Filed defts. affdt. and notice of motion barring prosecution on grounds of statute of limitations, denial of due process (speedy trial, etc.) ret. on: Sept. 21, 1976 at 10am.	
7-76	Filed govts. affdt. and notice of motion for adj. of trial from 10/18/76 to 11/1/76 ret. on: Sept. 21, 1976.	
21-76	Filed govts. affdt. of Arthur Cassidy.	
1-76	Filed govts. affdt. of Larry Taylor.	
9-23-76	Filed deft's omnibus motion for relief pursuant to F.R.C.P. Rules 6, 7, 12, 16 and 41(f), etc. - ret. 9-21-76	
3-76	Filed govts. memorandum of law.	
5-76	Filed, govts. affdt. of Wm. Aronwald.	
7-76	PTC held. Trial set for 10/18/76. Stewart, J.	
7-76	Filed defts. answering affdt.	
27-76	Filed govts. memorandum of law in support of show cause order of 6/23/76 before Judge Goffel.	
7-76	Filed defts. affdt. and OSC--ORDERED that the US Atty's. office show cause on 8/31/76 at 10:30am why Wm. Aronwald, Frank Juliano and Larry Taylor not be held in contempt; ORDERED that personal service be made by Aug. 26, 1976 at 2pm, etc. as indicated. Werker, J.	
7-76	Filed memo end. on above OSC--The deft. seeks relief by OSC with respect to certain of his personal possession which havenot as yet been turned over to him-- axixisxxxxxxx certain articles ax as indicated in the extenot of this endorsement are to be given to the deft. etc. as indicated. So ordered, Goffel, J. m/n	
27-76	Filed govts. supplemental memorandum of law.	
27-76	Filed govts. supplemental affdt. of Wm. Aronwald.	
25-76	Filed defts. memorandum of law in support of dismissal of indictment because of statute of limitations and denial of speedy trial.	
27-76		
7-76		

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DATE	PROCEEDINGS	Date Order Judgment No.
12-76	Harold Konigsberg (atty Frank A. Lopez,) motions argued. See official Court reporters minutes for counts decision....STEWART.J.	
13-76	Filed defts. affdvt. & notice of motion for reargument and to dismiss the indictment.	
16-76	Filed Govt's affdvt. and notice of motion for an Order pursuant to Rule 8(c) of the Criminal Rules of United States District Courts for the Southern District of New York directing the sequestration of the jury during the trial of the above-captioned case. Ret. 11-1-76	
16-76	Filed Govt's memorandum of law in support of the above motion	
17-76	Filed defts. affdvt. to have this Court put an end to the reign of terror that has been unleashed against the deft. and to see that the papers and documents that are vital to his defense preparation are returned to him.	
1-26-76	Hearing held in re Statute of Limitations -Dec. Res.....STEWART.J.	
22-76	Filed Opinion #45311 Defts. motion to dismiss the indictment as time barred is granted.....So Ordered.....STEWART.J.	
1-76	Filed Two Envelopes ordered by the court to be sealed and placed in cahiers (clerks office) vault....So Ordered....STEWART.J.	
1-76	Filed Notice of Appeal from the dismissal of the indictment entered on the 29th day of October, 1976... Mailed notice to deft. & U.S. Atty.	
2-76	Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A.	
11-76	Filed letter dated October 19-76, from Govt. to Judge Stewart.	
11-76	Filed letter dated October 19-76, from Henry J. Boitelxj to Judge Stewart.	
12-76	Filed transcript of record of proceedings dtd: October 26-76.	
12-76	Filed Transcript of record of proceedings, dated 8-2-76	
12-76	Filed Transcript of record of proceedings, dated 8-10-76	
12-76	Filed Transcript of record of proceedings, dated 8-31-76	
12-76	Filed Transcript of record of proceedings, dated 10-13-76	
12-76	Filed Transcript of record of proceedings, dated 9-2-76	
12-76	Filed Transcript of record of proceedings, dated 8-24-76	

[illegible]

A 10

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW, IN SECTION V, ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
			Interval Section (A)	Start Date End Date (B)	Code (C)	Task (D)
7-27-76	Deft. Konigsberg(atty. Frank A. Lopez, present) Defts. Provenzano, Briguglio and Vangelakos(Their attys. not present) By consent atty. F. Lopez on on behalf of all defts. and attys. For re-assignment. Case assigned to Judge Duffy. Conner, J. Konigsberg produced on a writ.					
7-23-76	Reassignment to Judge Stewart (ent 8-18-76) M/N					
8-25-76	Fld. Deft. (H J. Baitel) Pre-Trial Motions in behalf of Orders granting pre-trial relief etc...					
8-25-76	Fld. Deft. (A.P.) Memo of Law in support of above motion.					
9-02-76	Fld J. Edwards Affdvt. that Govt. dismiss Konigsberg's motion brought on by the order to show cause dtd 8-23-76					
9-02-76	Fld C.A. Butler affdvt. in opposition to deft Konigsberg's motion brought on by order to show cause and in support of the motion made by U.S. to dismiss Konigsbergs motion.					
9-02-76	Fld. J. Sommerville Affdvt. that the Court dismiss Konigsberg's motion brought on by the order to show cause dtd 8-23-76					
9-02-76	Fld. A E. Gupter Affdvt in opposition to Konigsberg's motion brought on by order to show cause and in support of the motion of the U.S. to dismiss said motion.					
9-02-76	Fld L. Taylor Affdvt. in opposition to deft Konigsberg's motion brought on by order to show cause and in support of the motion made by the U.S. dismiss Konigsberg's motion.					
9-02-76	Fld. Govt. Memo to dismiss the deft. Konigsberg's Motion brought on by order to show Cause.					
09-02-76	Filed Transcript of record of proceedings, dated 9-2-76					
9-10-876	Filed transcript of record of proceedings dt. 6/23/76 in the USDC, Trenton, New Jersey.					
9-15-76	Filed govts. memorandum of law.					
9-15-76	Filed govts. affdvt. of Wm. Aronwald.					
9-17-76	Filed govts. bill of particulars.					
9-17-76	Filed govts. affdvt. and notice of motion for adj. of trial from 10/18/76 to 11/1/76 ret. on: Sept. 21, 1976.					
9-22-76	Filed defts. reply memorandum of law in support of pre-trial motions.					
9-24-76	PTC held. Trial set for 10/18/76. Stewart, J.					
9-27-76	Filed govts. supplemental memorandum of law.					
9-27-76	Filed govts. supplemental affdvt. of Wm. Aronwald.					
10-12-76	Filed Transcript of record of proceedings, dated 7-1-76.					
10-12-76	Filed Transcript of record of proceedings, dated 7-1-76					

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS	Date Order or Judgment Noted
76	Filed Govt's affdvt. and notice of motion for an Order pursuant to Rule 8(c) of the Criminal rules of United States District Courts for the Southern District of New York directing the sequestration of the jury during the trial of the above-captioned case. Ret. 11-1-76.	
76	Filed Govt's memorandum of law in support of the above motion.	
-76	Hearing held in re. Statute of Limitations - Dec. Res....STEWART.J.	
0-29-76	Filed Opinion #45311 Defts. motion to dismiss the indictment as time-barred is granted.....So Ordered.....STEWART.J.	
	Filed Two Envelopes ordered by the court to be sealed and placed in cashiers (clerks office) vault....So Ordered.....STEWART.J.	
76	Filed Notice of Appeal from the dismissal of the indictment entered on the 29th day of October, 1976....Mailed Notice to deft. & U.S. Atty.	
76	Filed Notice that the original record record on appeal has been certified and transmitted to the U.S.C.A.	
6	Filed letter dated October 19-76, from Govt. to Judge Stewart.	
6	Filed letter dated October 19-76, from Henry J. Boitel to Judge Stewart.	
6	Filed transcript of record of proceedings dtd: October 26-76.	
76	<u>Filed Transcript of record of proceedings, dated 8-2-76.</u>	
19-76	<u>Filed Transcript of record of proceedings, dated 8-10-76</u>	
19-76	<u>Filed Transcript of record of proceedings, dated 8-31-76</u>	
76	<u>Filed Transcript of record of proceedings, dated 10-15-76</u>	
76	<u>Filed Transcript of record of proceedings, dated 9-2-76</u>	
76	<u>Filed Transcript of record of proceedings, dated 9-2-76</u>	

A 12

MINUTE DOCKET U.S. District Court

xxxxxx
 0208 1
 0260

PROVENZANO, ANTHONY

06 22 76 0580 01

04

U.S. TITLE SECTION

 13:1201(c)
 18:1201(a)

 OFFENSES CHARGED
 Consp. to kidnap.
 Consp. to kidnapping.

ORIGINAL COUNTS

1
2

BAIL • RELEASE

☐ AM ☐ Fugitive
☐ Denied ☐ Sec ☐ Pending
☐ \$ ☐ CNO ☐ JENA
☐ Date ☐ Surety Bond
☐ Bail Not Made ☐ Conditions
☐ Status ☐ Very Close

IF KEY DATES & INTERVALS:

ARREST or

U.S. Custody Began

6-22-76

Summons Served

First Appearance

INDICTMENT X

High Risk Date

Information

6-22-76

Indict Waived

In Charging District

Superseding

Indict Info L

ARRAIGNMENT

Trial Set For

1st Plea

Final Plea

☐ NG ☐ G ☐ NOL
☐ G Plea W/Drawn

☐ NG ☐ G ☐ NOL

TRIAL

Voir Dire

Trial Began

Trial Ended

SENTENCE

Disposition of Charges

☐ Convicted
☐ Acquitted
☐ Dismissed

☐ On All Charges
☐ On Lesser Offenses
☐ WOP ☐ WP

☐ On Government Motion

MAGISTRATE

DATE	INITIALS	INITIAL APPEARANCE DATE	INITIAL NO	OUTCOME
6/22/76		FILED FOR PROCEEDINGS SHEET		
		FILED FOR BAIL		
		FILED FOR COMMITMENT		
		FILED FOR RELEASE		
		FILED FOR OTHER		

ATTORNEYS

☒

 William I. Aronwald
 791-1135

 Maurice Edelbaum
 230 Park Ave.
 New York, N.Y. 10017
 tele: 732-1300

DATE: 6-22-76 PROCEEDINGS: Filed indictment. B/W ordered.
 6-23-76 Indictment ordered sealed.
 06-28-76 Indictment ordered unsealed.
 06-25-76 Filed appearance bond in the sum of \$100,000.
 Filed proceedings sheet from Newark New Jersey-
 Hon. Lawrence A. Whipple present- bail fixed in
 the sum of \$100,000. etc.
 07-01-76 Filed Govt's notice and affdvt. re: 75 Cr. 1194.
 07-01-76 Filed Govt's notice of readiness for trial.
 07-01-76 Deft. (atty. Maurice Edelbaum) pleads not guilty. Bail
 cont'd. Limits to include those set by Bonsal, J. in
 related case. Knapp, J.
 0/-02-76 Filed notice of appearance of atty. Maurice Edelbaum.
 07-20-76 Filed documents forwarded from the Dist. of N.J.
 (Magistrate's proceedings) docket sheet & temporary
 commitment- 6-24-76 deft. released on bail.
 07-23-76 Filed Opinion #44828 ... Accordingly, Indictment 75 Cr. 1194
 is returned to Part I to be assigned to a judge, etc. Bonsal, J. mn

Knapp, J.

Knapp, J.

(over)

FORM 256

DATE	DESCRIPTION	FILED	FILED	FILED	FILED
7-27-76	Deft. Konigsberg (att'y. Frank A. Lopez, Present) Defts. Provenzano, Brigulio and Vangelakos (their attys. not present. By consent att'y. F. Lopez on behalf of all defts. and attys. For re-assignment. Case re-assigned to Judge Duffy. Conner, J. Konigsberg produced on a writ.				
-26-76	Filed aff'dt. of W.I. Aronwald, Att'y. Joint Strike Force in support of a Writ Ad Test. Ret. 8-11-76...				
7-23-76	Reassignment to Judge Stewart (ent 8-18-76) M/N				
8-25-76	Filed Deft. (H.J. Boitel) Pre-Trial Motions in behalf of Defts A. Provenzano, S. Briguglio, and G. Vangelakos for Orders granting pre-trial relief...etc.				
8-25-76	Filed Deft. (A.P.) Memo of Law in support of above motion.				
9-02-76	Filed John Edwards Aff'dt. that Govt dismiss Konigsberg's motion brought on by the Order to Show Cause dtd 8-23-76.				
9-02-76	Filed Clarence A. Butler Aff'dt. in opposition to deft. Konigsberg's motion brought on by order to show cause and in support of the motion made by U S to dismiss Konigsberg's motion.				
9-02-76	Filed James Somerville Aff'dt. that the Court dismiss Konigsberg's motion brought on by the Order to Show Cause dtd 8-23-76.				
9-02-76	Filed Ave E. Gunter Aff'dt. in opposition to Konigsberg's motion brought on by Order to Show Cause and in support of the motion of the U S to dismiss said motion.				
9-02-76	Filed Larry Taylor Aff'dt. in opposition to deft. Konigsberg's motion brought on by order to show cause and in support of the motion made by the U S dismiss Konigsberg's motion.				
9-02-76	Filed Govt. Memo to dismiss the deft. Konigsberg's Motion Brought on by Order to Show Cause.				
7-22-76	Filed Transcript of record of proceedings, dated 7-2-76				
-10-76	Filed transcript of record of proceedings in the USDC, Trenton, New Jersey dtd. 6/23/76.				
9-15-76	Filed govts. memorandum of law.				
9-15-76	Filed govts. aff'dt. of Wm. Aronwald.				
9-17-76	Filed govts. bill of particulars.				
9-17-76	Filed one sealed envelope ordered sealed and impounded and not to be opened until further order of this court. Envelope contains transcript dtd. 9/2/76 (17 pages). Stewart, J. (in conference) (new)				
9-17-76	Filed govts. aff'dt. and notice of motion for adj. of trial from 10/18/76 to 11/1/76, ret. on: Sept. 21, 1976.				
9-22-76	Filed defts. reply aff'dt. of Henry Boitel				
9-22-76	Filed defts. reply memorandum of law in support of pre-trial motions.				
9-20-76	PTC held. Trial set for 10/18/76. Stewart, J.				
9-27-76	Filed one sealed envelope ordered sealed and impounded and to be placed in vault in Cashier's office. Envelope contains transcript of 9/2/76 and 9/21/76. Stewart, J.				

DATE	PROCEEDINGS
9-28-76	Filed govts. supplemental memorandum of law.
9-28-76	Filed govts. supplemental affdt. of Wm. Aronwald.
10-12-76	Filed Transcript dated 7-1-76
10-12-76	Filed Transcript dated 7-1-76
10-26-76	Filed Govt's affdvt. and notice of motion for an order pursuant to Rule 8 (c) of the Criminal Rules of United States District Courts for the Southern District of New York directing the sequestration of the jury during the trial of the above-captioned case. Ret. 11-1-76
10-26-76	Filed Govt's memorandum of law in support of the above motion.
10-26-76	Hearing held in re. Statute of Limitations- Dec. Res.....STEWART, J.
10-29-76	Filed Opinion #45311 Defts. motion to dismiss the indictment as time barred is granted.....So Ordered..... STEWART, J. m/n
11-3-76	Filed Two Envelopes ordered by the court to be sealed and placed in cashiers (clerks office) vault.....So Ordered.....STEWART, J.
11-04-76	Filed Notice of Appeal from the dismissal of the indictment entered on the 29 th day of October, 1976Mailed notice to deft. & U.S. Atty.
11-9-76	Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A.
11-8-76	Filed letter dated October 19-76, from Govt. to Judge Stewart.
11-8-76	Filed letter dated October 19-76, from Henry J. Boitel to Judge Stewart.
11-8-76	Filed Grandcript of record of proceedings dtd: October 26-76.
11-19-76	Filed Transcript of record of proceedings, dated 8-2-76
11-19-76	Filed Transcript of record of proceedings, dated 8-10-76
11-19-76	Filed Transcript of record of proceedings, dated 8-31-76
11-19-76	Filed Transcript of record of proceedings, dated 10-15-76
11-19-76	Filed Transcript of record of proceedings, dated 9-7-76
11-19-76	Filed Transcript of record of proceedings, dated 9-24-76

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 15

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UNITED STATES OF AMERICA, :

- against - :

ANTHONY PROVENZANO, :
SALVATORE BRIGUGLIO, :
HAROLD KONIGSBERG, and :
GEORGE VANGELAKOS, :

Defendants. :

INDICTMENT

76 Cr. 580

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INTRODUCTION

1. At all times relevant to the charges contained herein defendant ANTHONY PROVENZANO was President of Local 560, International Brotherhood of Teamsters.

2. Between the period on or about January 1, 1961 up to and including on or about June 6, 1961, Anthony Castellito was Secretary-Treasurer of Local 560, International Brotherhood of Teamsters.

3. At all times relevant to the charges contained herein Local 560, International Brotherhood of Teamsters owned the premises 707 Summit Avenue, Union City, New Jersey in which the said union occupied office space.

4. At all times relevant to the charges contained herein Anthony Castellito owned a home in Kerhonksen, New York.

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1961 up to and including on or about October 1, 1961, in the Southern District of New York, and elsewhere, ANTHONY PROVENZANO, SALVATORE BRIGUGLIO, HAROLD KONIGSBERG, and GEORGE VANGELAKOS the defendants, and Salvatore Sinno and Edward Skowron, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the grand jury known and unknown to commit certain offenses against the United States, to wit, to violate Title 18, United States Code, Section 1201(a).

2. It was part of said conspiracy that the defendants and their co-conspirators would and did unlawfully, wilfully and knowingly transport in interstate commerce from the State of New Jersey to the State of New York, Anthony Castellito, who would have been and was theretofore unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, carried away and held by the said defendants and co-conspirators for ransom, reward and otherwise, that is, for the purpose of murdering the said Anthony Castellito.

3. Among the means whereby said defendants and their co-conspirators would and did carry out the unlawful purposes of their conspiracy were the following:

(a) The defendant ANTHONY PROVENZANO would and did request that the defendants SALVATORE BRIGUGLIO and HAROLD KONIGSBERG murder Anthony Castellito.

(b) The defendant ANTHONY PROVENZANO would and did agree to pay a sum of money to defendant HAROLD KONIGSBERG in return for defendant HAROLD KONIGSBERG's participation in the murder of Anthony Castellito, and did thereafter give to the defendant HAROLD KONIGSBERG the sum of \$15,000.00.

(c) The defendant ANTHONY PROVENZANO would and did offer to appoint defendant SALVATORE BRIGUGLIO as a Business Agent of Local 560, International Brotherhood of Teamsters in return for defendant SALVATORE BRIGUGLIO's participation in the murder of Anthony Castellito, and did thereafter appoint the defendant SALVATORE BRIGUGLIO a Business Agent of the said Local.

(d) The defendant ANTHONY PROVENZANO would and did, in order to facilitate the murder of Anthony Castellito by the defendants HAROLD KONIGSBERG and SALVATORE BRIGUGLIO, arrange for "office space" to be rented to the defendant HAROLD KONIGSBERG in the premises 707 Summit Avenue, Union City, New Jersey.

(e) The defendant HAROLD KONIGSBERG would and did solicit the assistance of co-conspirator Salvatore Sinno in the murder of Anthony Castellito.

(f) The defendant ANTHONY PROVENZANO would and did request that co-conspirator Salvatore Sinno assist the defendants HAROLD KONIGSBERG and SALVATORE BRIGUGLIO in the murder of Anthony Castellito.

(g) The defendant ANTHONY PROVENZANO would and did arrange to be in Florida during the time when Anthony Castellito was to be murdered.

(h) The defendants HAROLD KONIGSBERG, SALVATORE BRIGUGLIO and GEORGE VANGELAKOS would and did arrange with co-conspirators Salvatore Sinno and Edward Skowron that Anthony Castellito would be inveigled and decoyed from the State of New Jersey to his home in Kerhonksen, New York where he would be murdered.

(i) The defendants ANTHONY PROVENZANO, SALVATORE BRIGUGLIO, HAROLD KONIGSBERG and GEORGE VANGELAKOS and co-conspirators Salvatore Sinno and Edward Skowron would and did agree that co-conspirator Salvatore Sinno would ask Anthony Castellito to allow co-conspirator Edward Skowron who would pose as a person on the "lam", hereinafter referred to as a "lamster", to use the said Anthony Castellito's Kerhonksen, New York home as a "hide-out".

(j) Co-conspirator Salvatore Sinno would and did meet with Anthony Castellito, who agreed to permit the "lamster" to use his Kerhonksen, New York home as a "hide-out".

(k) Co-conspirator Salvatore Sinno would and did meet with Anthony Castellito and introduced him to co-conspirator Edward Skowron who posed as the "lamster".

(l) Co-conspirators Salvatore Sinno and Edward Skowron would and did travel with Anthony Castellito from the State of New Jersey to Kerhonksen, New York.

(m) The defendants SALVATORE BRIGUGLIO and HAROLD KONIGSBERG would and did wait in Anthony Castellito's Kerhonksen, New York home for the said Anthony Castellito to arrive with co-conspirators Salvatore Sinno and Edward Skowron.

(n) Upon the arrival of Anthony Castellito at his Kerhonksen, New York home, he was murdered by the defendants SALVATORE BRIGUGLIO and HAROLD KONIGSBERG and co-conspirators Salvatore Sinno and Edward Skowron.

(o) During the period of time when Anthony Castellito was being murdered by defendants SALVATORE BRIGUGLIO and HAROLD KONIGSBERG and co-conspirators Salvatore Sinno and Edward Skowron the defendant GEORGE VANGELAKOS would and did dig a grave for the body of the said Anthony Castellito in the vicinity of the said Anthony Castellito's Kerhonksen, New York home.

(p) Following the murder of Anthony Castellito the original plan of the defendants and their co-conspirators to bury the body of the said Anthony Castellito in the vicinity of his Kerhonksen, New York home was aborted and the defendants SALVATORE BRIGUGLIO, HAROLD KONIGSBERG and GEORGE VANGELAKOS, together with co-conspirators Salvatore Sinno and Edward Skowron agreed and did transport the body of the said Anthony Castellito into the State of New Jersey where it was buried.

OVERT ACTS

In furtherance of, and to effect the objects of said conspiracy, the defendants and their co-conspirators committed and caused to be committed the following overt acts, among others, in the Southern District of New York and elsewhere:

1. On or about January 15, 1961 the defendants ANTHONY PROVENZANO and HAROLD KONIGSBERG met at 707 Summit Avenue, Union City, New Jersey.

2. Between on or about January 15, 1961 through July 31, 1961 the defendant HAROLD KONIGSBERG maintained "office space" in the building located at 707 Summit Avenue, Union City, New Jersey.

3. Sometime in or about the Spring of 1961 the defendants SALVATORE BRIGUGLIO and HAROLD KONIGSBERG went to the home of Anthony Castellito, located at 302 Baldwin Avenue, New Milford, New Jersey.

4. In May, 1961 the defendants SALVATORE BRIGUGLIO, HAROLD KONIGSBERG and GEORGE VANGELAKOS met with co-conspirators Salvatore Sinno and Edward Skowron at 707 Summit Avenue, Union City, New Jersey.

5. In May, 1961 the defendant ANTHONY PROVENZANO met with co-conspirator Salvatore Sinno at 707 Summit Avenue, Union City, New York.

6. On or about June 1, 1961 the defendant ANTHONY PROVENZANO departed for West Palm Beach, Florida from Newark International Airport, Newark, New Jersey.

7. On or about June 4, 1961 co-conspirator Salvatore Sinno met with Anthony Castellito in the vicinity of 707 Summit Avenue, Union City, New Jersey.

8. On or about June 5, 1961 co-conspirators Salvatore Sinno and Edward Skowron met with Anthony Castellito and travelled with him from Lodi, New Jersey to Kerhonksen, New York.

9. On or about June 5, 1961 the defendants SALVATORE BRIGUGLIO, HAROLD KONIGSBERG and GEORGE VANGELAKOS travelled to Kerhonksen, New York.

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10. On or about June 5, 1961 the defendants SALVATORE BRIGUGLIO and HAROLD KONIGSBERG together with co-conspirators Salvatore Sinno and Edward Skowron murdered Anthony Castellito in Kerhonksen, New York.

11. On or about June 5, 1961 the defendant GEORGE VANGELAKOS dug a grave in Kerhonksen, New York.

12. On or about June 5, 1961 the defendants SALVATORE BRIGUGLIO, HAROLD KONIGSBERG, and GEORGE VANGELAKOS together with co-conspirators Salvatore Sinno and Edward Skowron transported the body of Anthony Castellito from Kerhonksen, New York to the State of New Jersey.

(Title 18, United States Code, Section 1201(c).)

COUNT TWO

The Grand Jury further charges:

That on or about June 5, 1961, within the Southern District of New York, ANTHONY PROVENZANO, SALVATORE BRIGUGLIO, HAROLD KONIGSBERG, GEORGE VANGELAKOS, the defendants unlawfully, wilfully and knowingly did transport in interstate commerce from the State of New Jersey to the State of New York, Anthony Castellito who had theretofore been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away and held by the said defendants for ransom, reward and otherwise, that is, for the purpose of murdering the said Anthony Castellito.

(Title 18, United States Code, Sections 1201(a) and 2.)

FOREMAN

ROBERT B. FISKE, Jr.
United States Attorney

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 UNITED STATES OF AMERICA :
5 v. : 76 Cr. 580
6 ANTHONY PROVENZANO, SALVATORE :
7 BRIGUGLIO, HAROLD KONIGSBERG :
and GEORGE VANGELAKOS, :
8 Defendants. :
9 -----X

10 Before:

11 HON. CHARLES E. STEWART, JR.,

12 District Judge

13 New York, New York
14 October 26, 1975 - 3:15 p.m.

15 APPEARANCES:

16 U. S. DEPARTMENT OF JUSTICE
17 Organized Crime and Racketeering Section
Southern District of New York
18 BY: WILLIAM I. ARONWALD

19 MAURICE EDELBAUM, ESQ.
Attorney for Defendant Provenzano
20 BY: HENRY J. BOITEL, ESQ.,
of Counsel

21 FREDERIC C. RITGER, JR., ESQ.
22 Attorney for Defendant Briguglio

23 HAROLD KONIGSBERG, pro se

24 FRANK A. LOPEZ, ESQ.
Assisting Defendant Konigsberg
25

1 mkjl
2 THE COURT: Mr. Konigsberg, as I understand
3 it, you have refused to let the marshals inspect your
4 briefcase.

5 MR. KONIGSBERG: That is not true, your Honor.

6 THE COURT: Well, what is true?

7 MR. KONIGSBERG: Number one, I was carrying out--
8 they put the handcuffs on me, and here's the marks on me;
9 he made it so tight I could not move my hand. I had to lug
10 these things up.

11 Number two, he came up here, and wanted to
12 inspect. I gave him the bags, and told him, "Do what
13 you want."

14 He insisted I open these bags for him, after
15 he abused me, grabbed me around the throat, threw me
16 up against the wall, and I did not retaliate.

17 I do not know how much more I can go, standing
18 up like a man, being called all kinds of names and abuse.
19 If the marshals are going to continue with this conduct
20 and the Court doesn't want to protect me, dismiss the charge
21 and move me back to the jurisdiction where I came from.
22 This nonsense about they can do what they want and they
23 can seize papers, now papers have been seized.

24 THE COURT: This is not a question of seizing
25 papers, Mr. Konigsberg.

1
2 MR. KONIGSBERG: That is a question of what
3 happened the other day when I went to the hospital, the
4 Bellevue Hospital.

5 THE COURT: As you know, Mr. Konigsberg, I
6 have talked to Mr. Butler; you were there. Mr. Butler
7 agreed that nobody wants to look at your papers.

8 On the other hand, the marshals have a perfect
9 right to inspect the contents of your briefcase for
10 security purposes, just as they have the right to inspect
11 the contents of any lawyer's who walks into this courtroom.

12 MR. KONIGSBERG: I have no objection to that,
13 your Honor. My objection is to the abuse. If they want to
14 look at it, I will not stop them. I will only interfere
15 if they turn around and try to take anything out of there
16 or read anything.

17 THE COURT: All right. You understand what the
18 rules are?

19 MR. KONIGSBERG: The rules are simple, your
20 Honor, that they have a right to inspect it. I don't
21 have to aide them in their inspection. If they want to
22 inspect them, fine. Let him testify under oath and let
23 me testify. This nonsense must come to an end. Last
24 Thursday when I went to the hospital--

25 THE COURT: All right, Mr. Konigsberg, as you

1 mkjl

2 know, you have filed a motion with me which covers a lot
3 of subjects. I am not going to deal with that motion
4 now. I have referred it to Mr. Butler to get his comments
5 on what you have alleged in your motion, and we will deal
6 with it at another time, not today.

7 All right, gentlemen, I have read your briefs
8 on the motion for the statute of limitations, and I am
9 prepared to give to the defendants a total of 45 minutes
10 to argue the motions. I do not know how you want to divide
11 that up. And Mr. Aronwald, you may have 30 minutes.

12 MR. EDELBAUM: It is agreed, your Honor,
13 among counsel for the defense -- I have not consulted Mr.
14 Konigsberg, but since these motions on the statute of
15 limitations was made on behalf of three of the defendants,
16 I want to know if it is all right if I proceed first, your
17 Honor.

18 THE COURT: Yes, and, of course, my 45 minutes
19 means to include all of the defendants.

20 MR. EDELBAUM: I will be as brief as I can,
21 your Honor.

22 THE COURT: All right, Mr. Edelbaum.

23 MR. EDELBAUM: Your Honor, since you have read
24 the memorandum, and I assume that includes the Government's,
25 the replies, the letters, everything--

1 THE COURT: Yes.

2 MR. EDELBAUM: I assume that this argument
3 today is going to addresss itself mainly to the statute of
4 limitations question.
5

6 THE COURT: Only the statute of limitations,
7 yes.

8 MR. EDELBAUM: All right.

9 Judge, I don't think--well, first of all, we
10 all must agree that this is a case of first impression. I
11 understand that the Government has been unable to find a
12 case directly in point. We have not been able to find a
13 case directly in point. So this is a case of first
14 impression.

15 Our basic argument is that the statute upon which
16 the Government relies rests solely on the question of
17 penalty. If the penalty is gone, the statute is gone,
18 where ti says it can be brought at any time.

19 And I think by the fact, your Honor, that
20 congress, in its wisdom, in 1972, following the decision
21 of the 1968 case, which the Supreme Court had held the
22 death penalty unconstitutional, when congress enacted the
23 section eliminating in 1972 the death penalty, it recognized
24 that that would be constitutional.

25 Congress had a right, your Honor, if they wanted

1 mkjl

2 to, to put a saving clause in that section, saving all
3 cases prior to the enactment of the statute.

4 How unequitable it would be, your Honor, for it
5 to be found now that somebody who commits a crime today
6 could be prosecuted--could not be prosecuted ten years
7 from now, but if this indictment, under the reasoning of the
8 prosecution, was founded not today but then years from
9 now, despite what happened in 1972 when congress enacted it,
10 we could be prosecuted.

11 You know, your Honor, the thought that strikes
12 me, what would be equitable in this case, there was a time
13 when the Government had no right of appeal, when an indict-
14 ment was dismissed.

15 Your Honor recalls that in your long experience.

16 I refer over the years when a close question
17 of law came up, where it was a case of new impression, that
18 the Judge, and I say rightfully so, so that an injustice
19 would not be done to the Government, would always resolve
20 in favor of the Government, realizing that while the
21 Government had no right of appeal, the defendant, if the
22 case was tried, was to be protected by the right of appeal.
23 And if the Judge was wrong, the Appellate Court would
24 reverse.

25 But we are in a different situation now. And

this is what I say would be the most equitable thing to be done by your Honor.

If this case is tried, your Honor, it is going to take a number of weeks to try. And let's assume there is a conviction, your Honor. A lot of money will be spent in appellate processes by the defendants.

Wouldn't it be horrendous, your Honor, to go through all of this, if the Appellate Court should agree with us that this case should never have been brought because of the statute of limitations? Is there any way that anybody could make a defendant whole for what he goes through during a trial where he has to defend?

Now, this is not a case where they have a good case, a top case, an iron-bound case. This is a case 16 years old, where the principal witness, we are informed, was a participant in this case, an accomplice whose testimony has to be scrutinized with great care by a jury, and where, despite the fact, despite the fact that the principal witness was allegedly involved directly in the crime, allegedly knew where the body was buried--and we are told that they don't know where the body is, that searches have been made, not even the slightest evidence of bone, a skeleton, nothing has been ascertained.

Now, Judge, I am getting down to the bottom line.

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2 and I don't want to burden your Honor; the bottom line I
3 want to get down to is this: if your Honor should recognize
4 that this is not a frivolous argument that we are raising--
5 and I think the fact that your Honor set this down for
6 argument, you have recognized that it is not frivolous; it
7 is a case of first impression, and a case which, because,
8 for instance, of Judge Hand's decision, we have to
9 recognize that Judge Learned Hand was probably one of the
10 greatest legal scholars, in my generation, that we have
11 had in this district, in this country. Surely his decision
12 or his thinking should have great weight.

13 So what I am suggesting to your Honor, if you
14 should dismiss this indictment on the ground of the statute
15 of limitations, look what could happen. The Government
16 has a right of appeal. It could be expedited. We could
17 have a decision in very short time, and knowing, your Honor,
18 how Judge Kauffman has put down a rule how appeals have
19 to be expedited, we would have a very quick decision on
20 this, whereas the defendant, as a matter of right, cannot
21 appeal. The people have, as a matter of right, to appeal.

22 So I say to your Honor, in all justice, what
23 should be done, not cause--there is not a question of a
24 speedy trial anymore. If your Honor dismisses the indict-
25 ment, there is no question of rushing this case to trial

1 because of Mr. Konigsberg's situation.

2 I say to your honor, in all justice, that is
3 what should be done, and then we have a decision.

4 If the Court should say that you were wrong, the
5 Government was right, what harm has come to the Government?
6 16 years. But if your Honor should deny our motions, look
7 at the great harm that could come to these defendants, if
8 the Court should say that your Honor was wrong.

9 So I respectfully ask your Honor to consider
10 this case--I am not going to beat a dead horse. We have
11 briefed--I know I have briefed with my associate, Mr. Boitel,
12 this question very, very thoroughly, and when your Honor
13 tells me you have read it, that satisfies me, your Honor.
14 That satisfies me that you know what this is about.

15 I am not going to stand here and repeat what
16 it in our briefs. That would be wasting your Honor's time.
17 But what I wanted to bring out, your honor, what I have
18 just said to you is that justice requires that this indict-
19 ment, for the reasons stated, should be dismissed at this
20 time.

21 Thank you, your Honor.

22 THE COURT: Thank you, Mr. Edelbaum.

23 All right, Mr. Ritger.

24 MR. RITGER: Yes, sir.

1 mkjl

2 May it please the Court, I won't belabor this
3 issue. I think your Honor has certainly had the benefit
4 of excellent briefs, and I would like to adopt what Mr.
5 Edelbaum has said on behalf of his client, on behalf of Mr.
6 Briguglio. I think this, sir: we have really gotten down
7 to a very, very basic question here of interpretation, and
8 the statutes which we are dealing with, of course, congress
9 has indicated clearly it no longer sees fit to impose a
10 death penalty.

11 Regardless of what the Supreme Court has done
12 previously, congress acted of its own volition to eliminate
13 the clause, the provision for the penalty of death under
14 any circumstances.

15 There has been, in accordance, in the last few
16 weeks, a case in New Jersey, State versus Zarinsky. State
17 versus Zarinsky, of course, was decided in an entirely different
18 climate. The State of New Jersey had not seen fit to
19 eliminate the death penalty provisions from its statutes,
20 although the Supreme Court, of course, of the United States
21 has effectively removed their effect at this time.

22 The Court, the Appellate Division, in State
23 versus Zarinsky, dealt with a problem similar to this, but
24 not the same, because, first of all, as I have stated, the
25 State of New Jersey, the legislature has not seen fit to

1
2 eliminate the death penalty. Secondly, they were dealing
3 with an out and out homicide charge, not a kidnapping statute.
4 The Court said, in dealing with this homicide in New
5 Jersey, in dealing with statutes of limitations, that the
6 legislature made an exception for crimes punishable with
7 death. These extremely serious crimes were never to be
8 insulated by time.

9 The Court further in that same opinion said
10 that while the statute of limitations should be liberally
11 interpreted in favor of repose, its application must be
12 consonant with the intent and purpose of the law giver. It
13 is the legislative purpose which controls

14 So here the congress of the United States has
15 clearly indicated what its legislative purpose is. The
16 state of New Jersey, on the other hand, has not acted so
17 that the Court in New Jersey, it submitted, could sit back
18 and say that since the legislature has not acted and since
19 per se, the imposition of a death penalty for murder is not
20 off the books, then the statute of limitations for this
21 very serious offense should apply.

22 In fact, just the opposite--the statute of
23 limitations should not apply.

24 In here, in this case, congress again, as I
25 have said, has acted so we are face to face with this basic

mkjl

issue: does an offense which is committed in 1962, and at the time it was committed had no statute of limitations provision prohibiting its prosecution at any time thereafter, carry forward to a point where later the statute of limitations is amended? Does that or can that offense be punished no matter when it is uncovered? I think the answer to that is clearly no, it cannot.

The statute in effect at the time that it is prosecuted, is the one which must govern.

Here, because of the action of Congress eliminating the capital aspects of the kidnapping statute in 1972, the indictment coming years later, the indictment being for an offense which was committed in 1962, the indictment is invalid. It is beyond the term provided for of five years in the statute of limitations.

There has been some discussion in the briefs and also in oral argument concerning the Government's motion that a 1962 offense could be prosecuted and punished at any time. Then we would be placed in a position such as in the case of Bridges versus United States, where a later offense would be barred by a statute of limitations, but the earlier offense could still be prosecuted. The Court in Bridges dealt with that quickly and said that that is an impossible result and one not dictated by the

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2 statute. Therefore, if your Honor please, it is the
3 position of the defendant Briguglio that the statute of
4 limitations in this case serves to bar prosecution for the
5 offenses charged in the indictment and he moves for their
6 dismissal.

7 THE COURT: All right.

8 Mr. Eisenberg.

9 Mr. EISENBERG: If your Honor please, first I
10 would concur and adopt the statements made by my distinguished
11 co-counsel.

12 I should mention, your Honor, it is my under-
13 standing, after speaking to counsel off record, that the
14 decision in State versus Zarinsky is awaiting word from the
15 New Jersey Supreme Court as to its ultimate disposition.
16 However, I agree with the brief filed, that it is not
17 binding upon this Court. I also adopt the distinction that
18 was just made in terms of the fact that in New Jersey there
19 has been no legislative statement with regard to the murder
20 statute that was the question in that case, whereas, as was
21 pointed out before, the United States Congress has spoken and
22 neglected intentionally, I just assume, to include a statute
23 of limitations or to adopt no statute in the matter.

24 Your Honor, I would respectfully--

25 THE COURT: Mr. Eisenberg, Mr. Aronwald says

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2 that Congress has acted, yes, but the savings clause, the
3 general savings clause changes that.

4 MR. EISENBERG: Your Honor, I would refer
5 respectfully to the second brief on behalf of the three
6 co-defendants, which I think speaks more eloquently on the
7 subject than I could. I think there is a valid distinction
8 between the savings clause as relates to a repeal, a
9 legislative repeal, and that of a repeal under a holding
10 of unconstitutionality by our United States Supreme Court,
11 and I think the main case cited in that brief is clear and
12 is dispositive on that point.

13 Your Honor, for the Government to rely upon
14 an unconstitutional aspect of the statute is directly
15 contrary, I submit, to the fundamental proposition that an
16 unconstitutional act or an unconstitutional part of an act
17 is not law for any purpose, cannot confer any right, cannot
18 be relied upon as a manifestation of legislative intent,
19 certainly not in this case, and in legal contemplation, is
20 inoperative as if it had never been passed at all, and
21 that is fundamental to our law, and I would respectfully
22 cite at this time Norton versus Shelby County, 118, United
23 States 425, 442, the page from which I paraphrased, 6 Supreme
24 Court, 1121, and several other Supreme Court cases which,
25 if your Honor wants, I could submit in writing.

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2 Your Honor, I think there is no question--

3 THE COURT: This line of cases is to what
4 effect?5 MR. EISENBERG: That an unconstitutional aspect
6 of a statute, your Honor, is not law for any purpose and
7 cannot be controlling in any way.8 Once the Supreme Court in Jackson held that the
9 death penalty provisions of the kidnapping statute then in
10 effect was unconstitutional, it is unconstitutional ab initio.
11 It is unconstitutional for any purpose whatsoever, and no
12 weight, no legal reasoning can be based on any unconstitutional
13 provision, and that is what this line of cases stands for.
14 I think it stands for it on all fours.15 Your Honor, I briefly mention that kidnapping
16 has been held--17 THE COURT: So that it was unconstitutional
18 back in 1961.19 MR. EISENBERG: That provision, the death
20 penalty provision is, in effect, unconstitutional in 1961,
21 although whether or not the Court will make Jackson retro-
22 active is a second question.

23 MR. EDLBAUM: It did.

24 MR. EISENBERG: I believe it did in that context,
25 your Honor.

I would also say that our courts, the Fifth

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2 Circuit, in United States versus Hoyt, 451 Federal Second
3 570, 1971 decision, held that kidnapping can no longer
4 be treated as a capital offense.

5 Now, the statute of limitations, your Honor,
6 and I think learned counsel for the Government would agree,
7 is a procedural aspect; it is not substantive, it is
8 procedural.

9 The words of the statute, the non-statute of
10 limitations, if you will, states that in cases punishable
11 by death, there should be no statute of limitations.

12 Our Court has held that this is no longer a
13 capital case. This is no longer a case punishable by death
14 because that provision was unconstitutional. It is un-
15 constitutional now. It was unconstitutional at any given
16 point during that decision.

17 And with those few addendums, your Honor, I
18 would rest my arguments. Thank you.

19 THE COURT: Thank you.

20 All right, Mr. Lopez, Mr. Konigsberg.

21 MR. KONIGSBERG: Good afternoon, your Honor.

22 Your Honor, we live under a constitutional form
23 of government. A constitutional form of government consists
24 of three branches, the executive--I mean the legislative
25 first, the executive second, and the judicial third. There

1 is no question that the constitution is clear when it says
2 all legislative power herein granted shall be vested in the
3 Congress of the United States which shall consist of a
4 Senate and House of Representatives.
5

6 Now, there cannot be any question that in 1972
7 the United States Congress had repealed the death penalty,
8 as to kidnapping, into the section that we are indicted
9 under, and now when you read the law, the sections of law
10 in Title 18, U. S. Code, 3281, and 3282, it is clear, the
11 language of Congress' intent and desires. It states
12 clearly in 3281, capital offenses, "An indictment for any
13 offense punishable by death may be found at any time without
14 limitations, except for offenses barred by the provisions of
15 law existing on August 4, 1939."

16 Now we come to the next statute, 3232, offenses
17 not capital. It states very clearly, "Except as otherwise
18 expressly provided by law, no person shall be prosecuted,
19 tried or punished for any offense not capital unless the
20 indictment is found or the information is instituted within
21 five years next after such offense shall have been committed,
22 as amended September 1, 1951."

23 Now, if Congress has the sole power to make
24 law, and it has been their wish to say from now on
25 kidnapping will not be a capital offense, therefore, we

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2 fall into the statute 3282, where the statute of limitations
3 is five years.

4 Now it has been more than five years since this
5 crime has happened. Therefore the statute of limitations
6 attaches to this indictment.

7 In relation to the case that Mr. Aronwald has
8 brought to the Court's attention in State versus Zarinsky,
9 of course, that case has not been settled in its finality.
10 The court is still retaining jurisdiction, as best I can
11 find out, and in that case, the legislature of that state
12 did not find it necessary or at that point in time or this
13 point of time to repeal the death penalty.

14 In light of that, this case is completely opposite
15 to the issues at hand. Here we have Congress, who passed
16 a law stating what they wished as to the statute of limita-
17 tions, and five year limitations as to capital offenses
18 and non-capital offenses. We fall into the non-capital
19 offense.

20 Now, in Jackson, of course, you know the Supreme
21 Court dealt a death blow to the death penalty and no longer
22 the death penalty as to kidnapping is in existence. You
23 take that into consideration and bear in mind that the
24 executive branch only has the duty and obligation to enforce
25 and uphold those laws that Congress passes, not to abuse

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19

2 them.

3 The Government cannot in good conscience allow--
4 be allowed--I mean, the Court in good conscience cannot
5 be allowed to let the Government reap benefits they are not
6 entitled to because in effect it is a wrongdoing on the part
7 of the Government.

8 The Government has not acted in good faith
9 when it brought this case.

10 Now, there is one other thought in mind here
11 in relation that the Court is the final arbitrator under
12 our constitutional form of government. The Government, I
13 ask this Court at all times to bear in mind and take into
14 consideration the most important element, that if this
15 Court denies the Government the right to prosecute this
16 case because they do not fall within the framework of the
17 statute of limitations as stated in 3282, then they will
18 have an opportunity to appeal.

19 If you now permit them to reap the benefits
20 of their wrongdoing, or their bad judgment or their bad
21 view, we don't have that right to appeal until such time
22 as, god forbid, that we become convicted in this case,
23 and in light of that I ask this Court to deny the Govern-
24 ment the right to prosecute this case, give us the benefit
25 of the doubt, permit the Government to go appeal their issues,

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2 and then we will have at least a full judicial view of the
3 picture here and the Court can move forward with a trial,
4 if the Courts above decide that the statute of limitations
5 does not attach in our case.

6 I think you, your Honor.

7 THE COURT: Thank you, Mr. Konigsberg.

8 MR. LOPEZ: Your Honor, just may I add one
9 thing. Mr. Konigsberg also joins--I make the application in
10 his behalf--in arguments of co-counsel and any applications
11 they have made addressed to the statute of limitations.

12 THE COURT: Thank you.

13 Mr. Aronwald.

14 MR. EDELBAUM: May I just add one word?

15 THE COURT: Yes, Mr. Edelbaum.

16 MR. EDELBAUM: A number of the cases cited in
17 our brief say that when there is a question of doubt as to
18 the statute of limitations, it should be resolved in the
19 favor of lenity, in favor of the defendant, all of the
20 cases, and that was why one of the reasons I suggested to your
21 Honor the course that should be taken by the Court in view
22 of this case of first impression.

23 That is all I wanted to say.

24 THE COURT: All right.

25 MR. ARONWALD: Your Honor, of course, let me say

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21

1 that in view of the very extensive briefing that has been
2 done with respect to the issue before the Court by all
3 sides, it is not my intention to go into reiteration of
4 the points I have made.
5

6 However, very understandably, if the Court should
7 have any questions concerning any of the things that the
8 Government has set forth or advanced in the briefs, I
9 would be most happy to answer them. But getting to some of
10 the things that have been said this afternoon: I don't
11 quite agree with counsel for the defense that this is a
12 case of first impression. I think clearly up to a short
13 period of time ago it was a case of first impression, but
14 I think the Zarinsky case is an important case, and while
15 clearly under the doctrine of stare decisis the State
16 appellate Court in New Jersey is not binding on this
17 Federal Court. I suggest to the Court that the Zarinsky
18 case is extremely important because it is really on all
19 fours with the case here.

20 There have been attempts made to distinguish
21 Zarinsky, the most noteworthy of the quote, unquote,
22 distinctions have been advanced by Mr. Ritger this
23 afternoon, and by other counsel, that in Zarinsky there
24 was no amendment of the murder statute upon which the
25 defendant was being charged.

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Now that is true, there was no amendment in that case. There most certainly has been in 1972 an amendment by Congress of the Federal Kidnapping Act here.

Secondly, the charge in Zarinsky was a straight murder homicide charge. This is a kidnapping charge.

I submit to the Court that both of those distinctions are destroyed of any merit whatsoever.

First of all, insofar as the fact that Zarinsky was an out and out homicide charge and this is a kidnapping charge, that begs the issue. The answer is both were capital offenses.

Indeed, until we even go further, Zarinsky dealt with the homicide of an individual, and although this is a Kidnapping Act violation the indictment charges, and the Government would be permitted to prove at trial that the kidnapped victim, Anthony Castelleo, was kidnapped solely for the purpose of murdering him and that he indeed was murdered.

Insofar as the amendment distinction is concerned, I submit again, your Honor, that begs the issue. The issue in this case very simply is as follows: it is not the Congressional intent that governs at the time that Congress amended the Kidnapping Act in 1972. Congress clearly evidenced its intent at that time as a result of Furman, as

2 a result of Jackson, to take out the death penalty provi-
3 sions of the Federal Kidnapping Act.

4 However, that intent only applies to any
5 violation of the Kidnapping Act which would occur on or
6 after the effective date of the amendment, that is to say,
7 clearly for any violation of the Federal Kidnapping Act
8 which occurred on or after the 1972 amendment date of 1201,
9 it would be governed by the traditional, standard, five-
10 year statute of limitations.

11 But that does not resolve the issue before the
12 Court, and the issue before this Court is what was Congress'
13 intent at the time that the predecessor Kidnapping Act was
14 enacted? What was the intent of Congress that was in effect
15 as a result of that statute at the time, as the Government
16 alleges, Mr. Castellito was kidnapped and murdered?

17 That is the intent that controls. That is the
18 intent that is important, not what Congress' intent was in
19 1972.

20 Indeed, although counsel was arguing that had
21 Congress wanted to preserve the statute of limitations set
22 forth in 3281, that is no statute of limitations, that
23 Congress should have enacted specific savings clause
24 language.

25 I reject that argument, your Honor, as I have

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1 pointed out in my brief. Congress was under no obligation,
2 especially in light of the language set forth in the general
3 savings clause, to enact specific savings clause language,
4 when it amended 1201. Congress, as the ultimate lawmaker,
5 should understandably be presumed to know that the general
6 savings clauses literally applied, and as the Courts
7 have interpreted it, Warden v. Marrero, cited in our brief,
8 specifically states that the repeal of any statute shall
9 not have the effect to release or extinguish any penalty,
10 forfeiture, or liability incurred under such statute unless
11 the repealing act shall so expressly, and such statute shall
12 be treated as still remaining in force for the purpose of
13 sustaining any proper action or prosecution for the enforce-
14 ment of such pernalty, forfeiture or liability.
15

16 Indeed, most respectfully, your Honor, had
17 Congress not intended that 3281 would govern all prosecutions
18 for violations of the Federal Kidnapping Act occurring prior
19 to the amendment, then under the very language of the general
20 savings clause, Congress was obligated to exclude the
21 amendment from the language of the savings clause.

22 Just repeating it again very briefly, the
23 repeal of any statute shall not have the effect on release
24 or extinguish any penalty, forfeiture or liability incurred
25 under such statute unless the repealing act, that is the

1
2 amendment, shall so expressly provide. Congress, by not spe-
3 cifically providing for non-savings clause language in it.
4 amendment of 1201, reaffirmed the applicability of the
5 general savings clause to the predecessor statute.

6 And, your Honor, with respect to that, as we
7 have indicated--

8 THE COURT: It says, "Shall not release or
9 extinguish any penalty, forfeiture or liability," and I
10 guess the word that we concern ourselves with is penalty,
11 fight?

12 MR. ARONWALD: No, I think the word we
13 concern ourselves with, most respectfully, your Honor,
14 is "liability." When the defendants committed the crime
15 that they are alleged to have committed, they incurred a
16 liability under the statutes in force at that time. The
17 liability was prosecution. They were subject to prosecution
18 as a result of their act.

19 THE COURT: That hasn't been repealed,

20 MR. ARONWALD: No, sir, it has not. It has
21 not been repealed. What we have here is you have a situa-
22 tion where--

23 THE COURT: The only thing that 3282 does is to
24 change the penalty.

25 MR. ARONWALD 3282--no, 3282 just provides

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for the five-year statute of limitations. Congress, in amending 1201 in 1972, rendered it a non-capital offense for all purposes, including the purpose of applicability of which statute of limitations would apply.

The Government does not argue--the Government concedes that as of the effective date of the amendment of 1201, any violation would be governed by the five-year statute of limitations.

The issue here is what effect did that amendment--one of the issues is what effect that amendment in 1972 had on the viability of the predecessor statute from prosecution's standpoint.

We claim, in the light of the general savings clause, that this prosecution is a viable one.

In fact, your Honor, I don't really think anybody would seriously question the fact that the real issue to be decided here is not what effect the amendment had on the predecessor statute, but more importantly, what effect did Jackson have? Jackson was the case that knocked out the death penalty provisions of 1201 as being unconstitutional.

The real question to be decided here is not what effect Congress' 1972 amendment had cause, most respectfully, I submit the general savings clause resolves

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that in the Government's favor.

The real question is, what effect did Jackson have on 1201, and with respect to that, we have advanced to the Court the proposition that it has no effect insofar as 3281's applicability, that is the no statute of limitations statute to this charge, and the reason is a simple one.

As we pointed out in our brief, and as the Court said in Zarinsky, what you have here is you have a classification for convenience purposes only. What Congress did in enacting 3281 was they provided that any capital offense, an offense punishable by death, would not be barred by any statute of limitations, such as contained in 3282. And what Congress was doing was they were resorting to the classification theory, capital offense, offense punishable by death, in other words to avoid having to spell out each and every substantive statute which was subject to the death penalty.

Indeed, as the Court said in the Zarinsky case, your Honor, the unenforcability of the death penalty has not wiped the statute off the books. The unenforcability of the death penalty provisions of 1201, as a result of Jackson, did not wipe the statute off the books, nor did it render it a non-capital offense. It remained a capital offense for each and every purpose subject to the

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2 constitutional infirmity of the death penalty, and it is
3 interesting to note that in Jackson the Court did not
4 say there was anything wrong with the death penalty, per
5 se. What they were troubled with was, as 1201 was written
6 at that time, the only way that a defendant convicted of
7 violating 1201 could be sentenced to death was if he was
8 tried by a jury, and they were concerned about the con-
9 stitutional conflict between the Fifth and Sixth Amendments.

10 It was Furman that indicated that there may be
11 something inherently wrong with the death penalty, and
12 as we have said in our brief, it is submitted by the
13 Government that that was the reason that in 1972 Congress
14 amended the statute to exclude the death penalty provisions
15 altogether.

16 I submit to the Court that the language in
17 Zarinsky is especially compelling because of the issue
18 raised here.

19 In Zarinsky most particularly, your Honor, the
20 Court said, while the statute of limitations should be
21 liberally interpreted in favor of repose, its application
22 must be consistent with the intent and purpose of the law
23 giver. It is the legislative purpose which controls.
24 Clearly, the legislature intended to insure that crimes of
25 the most serious class would not escape prosecution by the

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mere passage of time. The phrase, offense punishable by death was a convenient means of identifying the several offenses to be included in the exception for which the death penalty was or would be provided in other sections of the criminal code. And the Court concluded, it is one thing to suspend the imposition of the death penalty for constitutional reasons, but this affords no reason for frustrating the legislative will by stating its additional sanction against murder, namely the relentless prosecution of that crime without limitation in time.

Now, in our brief, your Honor, we cited the watson case. The watson case is important, I think, for one reason. In Watson, the Court stated that despite Furma v. Georgia, and implicitly despite Jackson versus United States, the effect of Furman was not to repeal the substantive statute which contained death penalty provisions. And quoting from the Court's opinion, in a very literal sense the offense defined in Section 1111 is still a capital crime. The state still authorized the imposition of the death penalty, and Congress has not repealed it.

The same logic applies here. Jackson could not have had the effect of wiping out the kidnapping statute. Indeed, in Jackson, the Court very carefully pointed out that the scope of this ruling was directed only with

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2 respect to the constitutional dimensions raised as a result
3 of the death penalty provisions in 1201, but as a practical
4 matter, the Court in Watson said that the offense still
5 remains a capital offense, subject to all of the other
6 statutory benefits, statute of limitations included, which
7 relate to capital crimes. The only difference is that a
8 defendant can no longer be sentenced to death because of
9 a constitutional infirmity of the death penalty provisions
10 as it was enacted in 1201.

11 Now, counsel say or advanced to the Court today
12 that the only equitable result at hand is to grant this
13 motion and force the Government to seek its rights of
14 appeal within the Second Circuit. I think that overlooks
15 this Court's ability to make a rational, intelligent
16 determination as to the merits or demerits of the issues
17 raised.

18 In addition, I think it also overlooks the fact,
19 especially after 16 years, the Government has a right to
20 have these charges litigated, the Government has a right to
21 have this case tried as quickly and as expeditiously as
22 possible, and, if for no other reason, that any further
23 delay could only further prejudice the Government's case
24 in view of the fact that this crime occurred 16 years ago
25 and witnesses will be required to rely on recollections of

1 events that occurred 16 years ago. And more importantly,
2 your Honor, I don't think that is the way practice in this
3 district and in this circuit is to be carried out.
4

5 Assuming the Court were to grant the motion, and
6 assuming we were to go up to the Court of Appeals as
7 counsel suggests, and assuming we were to prevail, what
8 that means is we come back before your Honor, we try the
9 case, and assuming there is a conviction, the defendants still
10 have a right to appeal on other issues that might or might
11 not be raised during the course of the trial.

12 I submit to the Court that the only thing to
13 be accomplished by this Court granting the motion so that
14 the issue can be resolved by the Circuit Court of Appeals
15 rather than by your Honor is to further delay the ultimate
16 prosecution of this important case.

17 THE COURT: Well, I can assure you, Mr. Aronwald,
18 and indeed counsel for the defendants, that I am not going
19 to grant this motion just to provide for a review by a higher
20 Court.

21 MR. EDELBAUM: I did not say that. I don't want
22 your Honor to infer that.

23 THE COURT: I did not suggest that you did, Mr.
24 Edelbaum. I will decide this motion the way I think it
25 should be decided, solely on the merits--

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2 MR. EDELBAUM: I am sure of that.

3 THE COURT: --which have been put to me.

4 MR. ARONWALD: In closing, your Honor, I think
5 basically the Government's position is that the statute of
6 limitations is not the procedural benefit type statute, such
7 as the right to a list of jurors, a right to counsel, the
8 right to bail. Those all directly relate to the defendant's
9 absolute right, and it is interesting to know, as we look
10 at the legislative history of those statutes, it is clear
11 that the reason that Congress enacted those statutes was
12 because of its abiding concern that before any person be
13 put to death, that he be given every conceivable opportunity
14 to defend against the charges leveled against him. This
15 same intent does not underlie the statute of limitations.

16 With respect to crimes which are defined as
17 capital offenses or offenses punishable by death, those are
18 crimes which traditionally have been viewed as the ultimate
19 crime, the most serious type crime. Those crimes for which
20 the public's right and Congress' right are best preserved
21 by providing for there being no bar to any prosecution
22 because some date is reached, be it three years, five
23 years or ten years.

24 These are crimes for which, in the language of
25 Zarinsky, the public's interest is best served by promoting

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2 the relentless prosecution of those crimes regardless of
3 when the prosecution is undertaken.

4 It does not seem to me, your Honor, that the
5 Government should in this case be penalized because a
6 fortuitous event, which occurred several months ago,
7 namely the revealment of evidence which was not theretofore
8 available to us, because that fortuitous event happened
9 six months ago instead of in 1964 or 1965, should render
10 this prosecution void. And most respectfully, your Honor,
11 I submit to the Court that based upon all of the reasons
12 advanced by the Government in its memorandums of law,
13 clearly Congress' intent was that this prosecution should
14 not be barred under the five-year statute of limitations,
15 and I base that upon the authority and the statutes in
16 effect between the time this crime was committed in 1961
17 and 1972 when Congress amended the statute, and indeed,
18 I submit again that had Congress intended the opposite
19 effect of the general savings clause, then what it was
20 required to do in the 1972 amendment was to specifically
21 state that the savings clause would not apply to any
22 crime committed prior to the effective date.

23 MR. EDELBAUM: Your Honor, may I impose upon
24 the Court to permit Mr. Boitel, who prepared these papers,
25 just to address himself verh shortly to the question of

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2 the saving clause? He has briefed this very thoroughly, and
3 if your Honor would not object, he will take a very few
4 minutes.

5 THE COURT: Yes, Mr. Boitel.

6 MR. EDELBAUM: Thank you.

7 MR. BOITEL: Thank you, your Honor.

8 I would like to note, though, that Mr. Aronwald's
9 rather emotional argument about fortuitous events really
10 is something that the Court should not consider in a
11 case such as this because it really is directed against
12 any argument based on statute of limitations principles.

13 The Government could always come back after a
14 limitations had run and say, "Gee, we just found this out
15 a few months ago and we should not be barred." That
16 is really what he is arguing against. That argument should
17 be made to Congress, not to this Court.

18 He also argues that Congress could have provided,
19 specifically provided that the former, what he claims is
20 a former period of limitations be repealed by enactment of
21 a new statute.

22 The fact of the matter is Congress could have
23 provided for a lengthier period of limitations when it
24 enacted the new statute and it did not do so. If the
25 feeling of Congress concerning kidnapping was such that

1
2 people ought to be prosecuted for the rest of their lives
3 or for 20 years or 50 years, whatever, they could have said
4 so, but they did not say so.

5 But how do we reach this question of savings
6 clauses? We really reach it by virtue of what I consider
7 to be a spurious Government argument. Your Honor will recall
8 that in our initial papers we made a very simple argument.
9 The statute in this case, I guess it is 1201, isn't it, the
10 statute of limitations that there is no statute of limita-
11 tions for crimes punishable by death. It is clear beyond
12 any doubt that the kidnapping, as of the time this indict-
13 ment was returned, was not punishable by death.

14 Now, the words speak for themselves. So the
15 Government has a bit of a hill to climb to try to persuade
16 the Court that the words don't mean what they say.

17 So what does the Government do? They reach
18 out and they create a savings clause analagy, and that is what
19 did in their responsive papers. They cited no cases for the
20 proposition that in some way judicial decisions which
21 nullify the provisions of a statute show are saved by some
22 general saving clause. Yet that is the only argument they
23 had at the time, and they made that argument.

24 So we do a little research and we come up with
25 Bridges, which makes crystal clear that savings clauses,

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2 general savings clauses will not save procedural effects such
3 as statutes of limitations.

4 I will footnote that for a moment. The Govern-
5 ment made a big deal out of Watson in its argument.

6 The Watson case was really a case where a Court, in an
7 effort to see to it that any benefits which ought to accrue
8 to defendant will go to the defendant and doubts will be
9 resolved in favor of the defendant and gave the defendant
10 an extra lawyer. I hardly think that that case can be
11 cited as in any way really dispositive of the issue which
12 is before this Court. The closest the Government can come
13 is that New Jersey case, and I think we have addressed
14 ourselves to that.

15 But the point is the whole savings clause
16 argument is really a false argument, in my mind. It is one
17 created by the Government, in the first instance here, and
18 then we had to respond to it the best we could. We don't
19 think this Court has to go that far, but if it does go that
20 far, certainly Bridges is crystal clear authority for the
21 proposition that any saving that might have otherwise been
22 done here was not done. There is no specific savings
23 clause directed toward the period of limitations applicable
24 to kidnapping offenses, And Congress, to turn Mr. Aronwald's
25 argument around, Congress could have saved the period of

1 limitations for kidnapping offenses generally or for old
2 kidnapping offenses, when it amended the kidnapping statute.
3 But it did not do so.
4

5 In view of the general principle that these
6 issues of limitations are decided, when there is a doubt,
7 in favor of the defendant, I think everything I have said
8 so far leads us to the conclusion that is how it must be
9 decided in this case.

10 I think your Honor certainly should have grasped
11 Mr. Edelbaum's point. He certainly wasn't urging that
12 your Honor abdicate his responsibility in deciding this
13 issue, but rather in deciding the issue, your Honor can
14 take into account, as Courts have always taken into account
15 on close questions, if this be a close question, that the
16 other side does have the right to appeal.

17 We talk a lot about tying up courtrooms and
18 being over burdened, not having enough judges, et cetera,
19 et cetera. The fact of the matter is, as Mr. Edelbaum
20 has pointed out, there is a good possibility here, and I
21 don't think anybody can deny it, that at some point along
22 the line the Appellate Court will hold in favor of the
23 defendants if this Court should not hold in favor of the
24 defendants.

25 That is certainly a distinct possibility. I

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2 don't think Mr. Aronwald or anybody else can argue to the
3 contrary.

4 Now what we will have risked is we will have
5 risked certainly the situation of these defendants them-
6 selves having to expose themselves to a trial and the
7 expense and the anguish and everything else that is
8 connected with a trial. Additionally, we will have tied up
9 this court maybe for four weeks, maybe for six weeks, maybe
10 for more. I think this Court can ill afford it.

11 The issue is not terribly complex. If the
12 case has to go on appeal, this issue can certainly be
13 resolved fairly quickly. I think Mr. Edelbaum's proposal
14 is certainly worthy of consideration by the Court as a
15 factor affecting the Court's determination of the case.

16 Thank you.

17 MR. ARONWALD: May I just respond very briefly
18 to Mr. Boitel, your Honor?

19 THE COURT: Well, all right.

20 MR. KONIGSBERG: Your Honor, for 180 seconds,
21 I just want to bring one thing to the Court's attention.

22 THE COURT: Yes.

23 MR. KONIGSBERG: As the Court surely will recall,
24 as Mr. Aronwald stated, that the statute of limitations
25 would attach since 1972 as to this statute of kidnapping

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that we are indicted, but he feels it is nunc pro tunc,

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it is not back--in other words, it doesn't apply way back,

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but he concedes it applies from 1972 on. I hope the Court

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will take that into consideration that he conceded that

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there is a statute of limitation in effect now, but it does

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not apply yesterday. Of course, Mr. Aronwald wants the

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Court to impose a bill of attainder, or ex post facto law

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which is contrary to the right of even Congress. I hope

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the Court will take that into consideration in its

11

view.

12

THE COURT: All right.

13

MR. ARONWALD: Just very briefly, just in

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response to Mr. Boitel's points: we are not dealing here with

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a crime that was committed after the effective date of

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the amendment of Section 1201 in 1972. Sure, it is true

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that the statute, the kidnapping statute which was in

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effect and on the books at the time this indictment was

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filed, was the amended Kidnapping Act. But, your Honor,

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the indictment does not charge this crime in the language

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of the 1972 amended Kidnapping Act. This indictment tracks

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the language of the Kidnapping Act which was in effect

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prior to the 1972 amendment. That is the statute we

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have charged these defendants with having violated. Sub-

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ject to the realization that the death penalty cannot be

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imposed. And so the question as to what statute was in effect at the time this indictment was filed is really irrelevant to this issue because this indictment tracks the language of the predecessor 1201, and that has always, I think, been understood.

Now, with respect to the Bridges case suggested by Mr. Boitel, the Government has not disputed that where the statute, which is amended, were repealed is itself a statute of limitations, that in that situation, absent a specific savings clause, that statute of limitations is not saved by virtue of the general savings clause. But the point we have tried to make throughout is that this case does not deal with a situation where Congress amended the statute of limitations. That they did not do. Congress amended the substantive statute and the substantive statute does derive the benefit of the general savings clause.

MR. LOPEZ: Your Honor, may I just say two words. I don't want to belabor this argument.

THE COURT: Yes.

MR. LOPEZ: As I recall, your Honor, I don't have the exact statute before me, but my recollection is that the 1972 amendment, after the death penalty was ruled out, that statute and the statute that was in effect in 1961 are practically identical except for the penalty and

1 liabilities that were imposed, and I think, as Mr. Boitel
2 has pointed out to me just a few moments ago, with respect
3 to ambassadors or diplomatic officials, I have a recollection
4 of that.
5

6 But, your Honor, I think, as Mr. Aronwald poses
7 the question is it whether the general savings clause here
8 can actually save a prosecution based on a penalty and liability
9 which the Supreme Court of the United States has held to be
10 constitutionally impermissible and prohibited and which
11 Congress in the full realization that the Supreme Court of
12 the United States has congressionally struck down that por-
13 tion of it, did nothing to save this same type of crime
14 in 1972, and I think very fairly, your Honor, this is the
15 question, among others, as Mr. Boitel has raised, and which
16 we join, of course, which your Honor faces here.

17 Thank you very much.

18 THE COURT: All right, gentlemen, thank you
19 very much.

20 Mr. Aronwald, Mr. Konigsberg, Mr. Lopez--I
21 don't need the rest of you--I would like to talk about your
22 recent motions, Mr. Konigsberg, about the way you are being
23 treated in jail.

24 MR. EDELBAUM: Are we excused, your Honor?

25 THE COURT: Yes.

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2 MR. EDELBAUM: Thank you very much for the
3 consideration given this afternoon to our argument.

4 THE COURT: Thank you.

5 (Recess.)

6 THE COURT: I have your affidavit, Mr.
7 Konigsberg, and I also have--well, I have your affidavit.
8 As I mentioned earlier, I submitted your motion with respect
9 to the treatment you claim you have been getting at the MCC
10 to the warden, and I have asked for a very prompt reply. I
11 expect to hear from them in the next day or so.

12 I will also send them a copy of your affidavit
13 which you handed to me today.

14 Now, on the hearing which is scheduled to
15 begin tomorrow, I have a matter which I have got to
16 take up tomorrow morning, and it may run into the afternoon,
17 so I would like to postpone that hearing until Thursday.

18 MR. LOPEZ: May I be heard, your Honor?

19 THE COURT: Yes, Mr. Lopez.

20 MR. LOPEZ: Is there a possibility to adjourn
21 the matter of the scheduled hearing until November 4th?
22 There are quite a number of issues, your Honor, and the
23 matter of subpoenas that have to be settled, perhaps we
24 can settle it now, but they have to be served in connection
25 with that hearing. I fully appreciate and realize that

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2 we need not nor do we have to complete the hearing in
3 consecutive days but we may take them piecemeal as your
4 Honor's calendar permits and as the main witnesses who
5 are involved can be made available.

6 Now, Mr. Aronwald has been cooperating to a cer-
7 tain extent, your Honor, to put it this way. He will have
8 available for us 17 witnesses who have been involved with
9 this, quote, investigation, unquote, your Honor, and we are
10 hopeful that we may interview at least some of them or at
11 least get a response, when we can actually prepare with
12 these witnesses for the sealed hearing.

13 There are also a number of other matters
14 upon which we have enlarged the sealed hearing, and which
15 we think have a direct relevancy to them.

16 We also have all the subpoenas prepared, your
17 Honor. I have been preparing them, and they number at
18 least 20, 25 perhaps, and so, therefore, I am hopeful that
19 your Honor can adjourn the sealed hearing over to November
20 4th, which will place us in a better posture.

21 Unfortunately, your Honor, I don't have all the
22 resources available to me to be able to complete all this
23 work. I have been consistently on trial, your Honor, since
24 the beginning of August, but I can assure your Honor that I
25 have attempted to be dilligent, although I have not been

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2 able to give of myself one hundred percent to Mr. Konigsberg,
3 because of my other committments and other matters.

4 So for that reason I would hope that your
5 Honor would put over the sealed hearing until November 4th.
6 I have spoken with Mr. Aronwald. He has indicated to me
7 that he is, of course, dispositive to proceed and he could
8 use, himself, the additional time to best prepare for the
9 sealed hearing, so that we can prepare further on this
10 matter.

11 I am reminded, your Honor, when I was at the
12 University of Salamanca, there is a statue there of an
13 old Spanish 16th century professor who is an international
14 lawyer of some repute, and he said, "If I had more time to
15 prepare I would have said less."

16 THE COURT: What about this, Mr. Aronwald?

17 MR. ARONWALD: Your Honor, I don't know whether
18 you have seen the copy of the letter.

19 THE COURT: I have just received it.

20 MR. ARONWALD: This is a problem we have, your
21 Honor. I think Mr. Konigsberg has got to be made to
22 understand that really because he requests something
23 doesn't mean he is entitled to it. Indeed, much of the
24 material set forth in this letter, as I have indicated to
25 him, just before, has absolutely no relevancy at all to the

scope of the hearing that we are about to embark on.

The issue is a limited issue, and I don't think I have to go into what the issue is because your Honor understandably has had a chance to see the papers, but with respect to whether there was or was not bugging of offices either belonging to Mr. Konigsberg or of others has absolutely no relevancy or application to the immunity issue raised, and it becomes very difficult for the Government to prepare its case to go forward at this hearing and on the other hand have to deal with 16 witnesses to find out whether they will talk to Mr. Konigsberg or not talk to him.

Indeed, he lists 17 names on page 1 of the letter of people that he wants. When we met in my office at the close of the last pretrial conference there were 16 names. There is another name on here that I had not seen before.

I have been sending to your Honor copies of all of my letters to Mr. Konigsberg, advising him as to the status of my efforts to make these people available and to find out whether they will talk to him before the hearing. I have done that for a reason. The reason is not only so that Mr. Konigsberg knows what efforts are being made, but also so that the Court can understand the

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2 burden that the Government has assumed by trying to accom-
3 plish these things for him.

4 Insofar as his requests for additional time
5 is concerned, I think this thing can go on and on and on.
6 I think we ought to set a date and go forward with the
7 hearing.

8 In light of discussions I have had with Mr.
9 Lopez and Mr. Konigsberg some two hours before we came up
10 here this afternoon, I would be prepared to put or agree to
11 put this hearing off until Monday, November 1st, but I
12 really don't see any reason to put it off to as late
13 as November 4th.

14 I should also add that another problem we have
15 had is getting our witnesses ready because this thing has
16 had so many changes that I have to keep telling them to
17 change and revise their travel plans.

18 THE COURT: I am reminded that I have a case
19 which has to go to trial on November 1st, but I am told
20 it will be a very short trial. So we will make it November
21 4th as Mr. Lopez has requested.

22 MR. LOPEZ: Thank you very much, your Honor.

23 MR. KONIGSBERG: Maybe we can--we definitely
24 need aide from the Court. Mr. Aronwald makes allegations in
25 relation to--

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2 THE COURT: Well now, Mr. Konigsberg, if you have
3 got some--I take it Mr. Aronwald will tell me if there are
4 things in here which he thinks he should not be required to
5 produce.

6 MR. ARONWALD: I can do that right now.

7 THE COURT: Why don't you send me a memo, Mr.
8 Aronwald. It doesn't have to be extensive, just a state-
9 ment as to the things which you think you should not be
10 required to produce and why not, and we will take it from
11 there.

12 MR. KONIGSBERG: Your Honor, I have to antici-
13 pate I am going to trial. I am seeking everything that I
14 need to go to trial, to prepare for trial.

15 THE COURT: I want to find out from Mr.
16 Aronwald why he thinks some of these matters are not
17 producable and then I will be in a better shape to act on
18 it.

19 MR. ARONWALD: I should say for the record, your
20 Honor, while Mr. Konigsberg says these are things he needs
21 so he can go to trial on this case, if your Honor will look
22 at the letter, it begins by saying that these requests are
23 being made in connection with the sealed hearing.

24 THE COURT: Yes, I have noted that.

25 MR. KONIGSBERG: But it is broken down in parts,

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2 witnesses. Now in relation to certain other aspects of
3 bugging, I can answer, but the Court, I mean Mr. Aronwald
4 is asking me to give him offers of proof. Did he give me an
5 offer of proof when he brought up the witness from Kentucky?
6 I will give offers of proof to the Court.

7 THE COURT: I am not concerned about that, Mr.
8 Konigsberg. What I am concerned about is why Mr. Aronwald
9 thinks he should not produce some of the things you have
10 requested and he is going to tell me and he will tell you.

11 MR. KONIGSBERG: All right.

12 THE COURT: We will proceed from there.

13 MR. KONIGSBERG: The point it--

14 THE COURT: I can hear from you, Mr. Aronwald,
15 within the next--when?

16 MR. ARONWALD: Your Honor, I hope to be able
17 to have the memorandum up to you by the close of business
18 tomorrow or early the following day.

19 I am in the process, as I indicated to your
20 law clerk--

21 THE COURT: You can have it to me by noon
22 Thursday.

23 MR. ARONWALD: As I indicated to your law
24 clerk, I am in the process of preparing a written notice on
25 sequestration which I should have up to you tomorrow.

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2 THE COURT: You don't need to rush that.

3 MR. ARONWALD: It is pretty well done, so I
4 will give it to you.

5 THE COURT: All right, gentlemen, thank you.

6 MR. KONIGSBERG: Your Honor, we have a lot of
7 problems that the Court has to resolve.8 MR. LOPEZ: Your Honor, may I say one little
9 thing. With regard to these subpoenas, what is the best
10 way of handling them? I have at lease 20, 30 subpoenas.

11 THE COURT: Prepare them and submit them to me.

12 MR. LOPEZ: Fine. I am ready to submit them
13 then, May I submit them then? Shall I have Mr. Aronwald
14 look at them?

15 THE COURT: Do you want to see them?

16 MR. ARONWALD: Your Honor, only to the extent
17 that the Court thinks that perhaps we can expedite some
18 of this. If records are being subpoenaed which the
19 Government would have no objection to, then a subpoena will
20 not be necessary. I will try to make arrangements to have
21 the records available.22 If there is something we would have a dispute
23 over, that is something that would have to be referred to
24 your Honor.

25 MR. KONIGSBERG: I would like to settle that

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2 once and for all. Rather than play games--

3 THE COURT: Take a few minutes and talk with
4 Mr. Aronwald about it. After you have finished talking to
5 him, you will get to me the subpoenas that you need me to
6 sign.

7 MR. LOPEZ: All right.

8 THE COURT: All right, gentlemen, thank you.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

76 Cr. 580

ANTHONY PROVENZANO, :

SALVATORE BRIGUGLIO, :

HAROLD KONIGSBERG, And :

GEORGE VANGELAKOS, :

Defendants. :

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M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Defendants Anthony Provenzano, Salvatore Briguglio, Harold Konigsberg and George Vangelakos have been charged with violating 18 U.S.C. §1201. The two counts of the indictment charge 1) that the defendants conspired "[f]rom on or about the 1st day of January, 1961 up to and including on or about October 1, 1961" to kidnap Anthony Castellito, then Secretary-Treasurer of Local 560 of the International Brotherhood of Teamsters, for the purpose of murdering him, and 2) that defendants kidnapped Castellito by taking him from New Jersey to New York for the purpose of murdering him "on or about June 5, 1961." This indictment was handed up by the Grand Jury on June 22, 1976.

Defendants have moved for dismissal of the indictment on the ground that it is barred by the statute of limitations.

There are two sections of the United States Code that set forth the statutes of limitation applicable to criminal offenses. The first, 18 U.S.C. §3281 applies to "[c]apital offenses" and provides

An indictment for any offense punishable by death may be found at any time without limitation...

The second, 18 U.S.C. §3282 applies to "[o]ffenses not capital" and provides

Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Since the indictment in the instant case was returned some fifteen years after the alleged offenses were committed, it is time-barred unless §3281 governs. In order for §3281 to apply, the offense must be "capital," which traditionally has meant "punishable by death." To determine whether a violation of §1201 may be considered capital now, we must analyse the particular transitions which the death penalty provision of the kidnap statute has gone through since 1961.

In 1961, 18 U.S.C. §1201 read in pertinent part

(a)...Whoever knowingly transports in interstate commerce...any person who has been unlawfully kidnapped...and held for ransom or reward or otherwise...shall be punished (1) by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

and

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished as provided in subsection (a).

In the instant case, the government has alleged that the kidnap victim was not "liberated unharmed" (Castellito is alleged to have been murdered). Thus in 1961, when the offenses were alleged to have taken place, they could have been punishable by death so they would have been "capital offenses" within the meaning of 18 U.S.C. §3281.

However, in 1968, the United States Supreme Court held that the death penalty provision of the statute was unconstitutional. In United States v. Jackson, 390 U.S. 570 (1968), the Court found that because the death penalty could only be imposed "if the verdict of the jury shall so recommend," the provision placed an unconstitutional burden on the assertion of the accused's Fifth Amendment right not to plead guilty and Sixth Amendment right to demand a jury trial (Id. at 591). Accordingly, the Court held that the death penalty provision was "unenforceable." On October 24, 1972, the kidnap statute was amended by Congress to totally eliminate the death penalty provision. P.L. 92-539, Title II §201, 86 Stat. 1072. To determine, then, what statute of limitations is applicable when the alleged offense occurred in 1961 and the indictment was returned in 1976, we must decide what effect, if any, the Jackson ruling and the 1972 amendment have on the characterization of a violation of the kidnap statute as a "capital offense."

First, we will consider the effect of the ruling in Jackson. After Jackson, no death penalty could be imposed constitutionally under the terms of §1201. The question is whether this rendered prosecutions under this statute "non-capital" for purposes of the statute of limitations. This specific issue has never been raised before under §1201. However, other courts have dealt with prosecutions under §1201 (and other statutes whose death penalty provisions had been declared unconstitutional) where they had to determine the continued applicability of other statutory provisions which prescribed particular procedures when an accused was faced with a "capital" crime. See United States v. Massingale, 500 F.2d 1224 (4th Cir. 1974); United States v. Hoyt, 451 F.2d 570 (5th Cir. 1971), cert. den., 405 U.S. 995 (1972); Reed v. United States, 432 F.2d 205 (9th Cir. 1970), cert. den., 401 U.S. 957 (1971) [all involving prosecutions under §1201 and the question of whether 18 U.S.C. §3432, requiring a list of witnesses and veniremen to be furnished the defendant and F.R.Crim.P. 24(b), allowing 20 peremptory challenges, were still applicable]; United States v. Watson, 496 F.2d 1125 (4th Cir. 1973) [prosecution under 18 U.S.C. §1111 (murder) raising question as to applicability of 18 U.S.C. §3005 providing two attorneys]; United States v. McNally, 485 F.2d 398 (8th Cir. 1973), cert. den., 415 U.S. 978 (1974) [prosecution under 49 U.S.C. §1472(1) (air piracy) raising question as to applicability of Rule 24(b)]; United States v. Crowell, 359 F. Supp. 489 (M.D. Fla. 1973) aff'd., 498 F.2d 324 (5th Cir. 1974) [prosecution under 18 U.S.C.

§2113(a), (b) and (e) (bank robbery) and applicability of §3432 and Rule 24(b)]; State v. Flood, 263 La. 700, 269 So. 2d 212 (La. 1972); State v. Holmes, 263 La. 685, 269 So. 2d 207 (La. 1972) [both involving murder prosecutions under state law raising questions of the defendant's eligibility for bail and of the applicability of requirements of a unanimous jury, a bill of exceptions, sequestration of jury, etc.]; People v. Anderson, 6 Cal. 3d 657, 100 Cal. Rptr. 152, 493 P.2d 880 (Ca. 1972) [state murder prosecution and eligibility for bail]; State v. Zarinsky, 143 N.J. Super. 35 (App. Div. 1976), app. pending [state murder prosecution and applicability of unlimited statute of limitations].

While the courts have reached different final conclusions as to the continued applicability of the procedural statutes in these cases, they have all followed a similar process of reasoning. The analysis in United States v. Watson, supra, is typical. There the question was whether the holding in Furman v. Georgia, 408 U.S. 238 (1972), had rendered the offense charged (murder) non-capital for the purposes of determining whether the accused still had a right to the appointment of two attorneys, allowed under 18 U.S.C. §3005 to those faced with "capital" crimes. The Court noted that "in a very literal sense," the statute still authorized the imposition of the death penalty since Congress had not repealed it. Further, Congress had done nothing to amend, in light of Furman, any of the procedural statutes which provided special rules for "capital" cases. As Congress had not yet acted, the Fourth Circuit was loathe to do so unless it were

convinced that continued application of the two-attorney statute "could not conceivably serve any of the purposes that motivated Congress to enact it" (Id. at 1128). Thus, the Court looked behind the two-attorney rule to see whether the sole reason for it was the defendant's potential exposure to the death penalty, or whether Congress had other rationales relating to the complexity or grave nature of offenses punishable by death. The Watson court concluded that the complex nature of capital cases, as well as the gravity of the penalty, supported the two-attorney rule. Since the unconstitutionality of the death penalty in no way altered the complexity of the offense, the Court held that it was still "capital" for the purpose of applying the two-attorney rule.

Similarly, courts have looked to the purpose behind making "capital" offenses non-bailable when deciding whether a ruling that the offense could not constitutionally be punished by death meant that the offense was now bailable. On this question of purpose, the courts have split. Some have found that the gravity of the penalty was the sole reason for making the offense non-bailable (see e.g. Flood, supra), and others have concluded that it was the grave nature of the offense that made the offense non-bailable, and since the unconstitutionality of the death penalty had not changed this nature, the offense remained non-bailable (see e.g. Anderson, supra).

Thus, considering the effect of Jackson alone, we are instructed by previous decisions to consider the rationale behind providing an unlimited time within which a prosecution may be

brought for certain offenses which are referred to by statute as "capital offenses."

The legislative history behind §3281 consists of a Senate and a House Report (Senate Report No. 215 dated March 27, 1939 and House Report No. 1337 dated July 27, 1939). The Reports offer only one explanatory statement--a letter from the then Attorney General stating:

Existing law...provides that no person shall be prosecuted for a capital offense, willful murder excepted, unless the indictment is found within 3 years after the commission of the offense.

The experience of this Department has been that the time allowed by this statute is too short, especially as to the more serious offenses.

I therefore recommend that, as to any offense for which the death penalty may be imposed, no statute of limitations shall apply...

A brief list of some of the offenses for which the death penalty could be imposed followed.

The above statement is not especially revealing of Congressional intent, since it refers only to the Justice Department's experience with the three-year limit. It does suggest that the Department had encountered problems in preparing for prosecutions of the "more serious" of the capital offenses, arguably because of their complexity. Thus we may conclude that it was something in the nature of the offenses which indicated the necessity for a longer statute of limitations. It may be suggested, in addition, that Congress may have wanted to be sure that those who had committed crimes of such a serious nature would never, by lapse of time, be able to

avoid punishment.^{1/} The alternative reasoning would be that the gravity of the death penalty mandated an unlimited time in which prosecutions could be brought (and during which a defendant would continue to be exposed to liability). We cannot discover the logic that would support such a proposition and we reject it.

Thus we agree with the government that the term "capital offense" was used in §3281 as a shorthand reference to a category of offenses of a particularly serious nature. The ruling in Jackson did not alter the nature of the offense. The Jackson court concluded that Congress believed kidnapping was so serious a crime that Congress would not want the whole statute to fall just because the death penalty provision could not constitutionally stand (390 U.S. at 590-91). Thus the Court held that the penalty provision was severable. We might be inclined, therefore, were Jackson the only pertinent event, to hold that it did not transform §1201 into a non-capital offense for purposes of the applicability of §3281, and to rule that the prosecution here would be timely.

However, as the Fourth Circuit noted in Watson, a court has a different role when determining the ramifications of a judicial holding that a death penalty provision is unconstitutional, from that when Congress has taken some action on the matter. Thus in Massingale, supra, when the same Circuit was faced with the question of whether a defendant charged under §1201 would be entitled to the benefits of Rule 24(b) and 18 U.S.C. §3432, it

^{1/} See discussion in Zarinsky, 143 N.J. Super. at 48-51.

held that the 1972 Congressional amendment to §1201 precluded the court from engaging in any of the analysis followed in Watson, and clearly "removed kidnapping from the classification of a capital offense" (500 F.2d at 1224).

In 1972, the death penalty provision of 18 U.S.C. §1201 was repealed and all violations of the statute were made punishable "by imprisonment for any term of years or for life."^{2/} We are

2/ We note in passing that initial amendments to §1201 retained the death penalty provision, but modified it by "correcting the defect in the present provision disclosed in United States v. Jackson" and by authorizing "its imposition only if the victim dies as a consequence of the crime" (Letter from the Secretary of State and Attorney General contained in House Report 92-1268 and Senate Report 92-1105, U.S. Code Congressional and Administrative News, 92nd Congress - 2d Session, Vol. 3, p. 4322 (1972)). However, the final version repealed the death penalty provision entirely. The only discussion of the reason for repeal appears in remarks made on the House floor during debate on the new bill by Rep. Richard H. Poff of Virginia, one of the bill's original sponsors. Representative Poff stated that the death penalty provision had been written out because of Furman. He noted, however, that

[t]he conforming of the penalty provisions of this bill to the apparent requirements of the Furman decision is nothing but a stopgap handling of the death penalty question. A more lasting determination of how, and whether, the death penalty might be prescribed for the offenses covered by this bill, or for any other Federal is an important and complex matter in itself, and passage of this otherwise relatively noncontroversial measure should not await a permanent of that issue. Congressional Record, Vol. 118, Part 21, p. 27116 (August 7, 1972).

Whatever may be inferred from these remarks as to the general attitude in Congress concerning the death penalty, the present determination that there should be no death penalty under §1201 is plain.

not aware of any steps taken by Congress to amend other provisions of Title 18 or the Federal Rules of Criminal Procedure or the statute of limitations so as to validate their continued applicability to the new §1201. Where Congress has not acted to reconsider related statutes, we may not infer an intent to do so. Thus we agree with the Fourth Circuit in Massingale that Congress has now clearly removed kidnapping from the classification of "capital offenses."^{3/} Accordingly, the five-year statute of limitation of 18 U.S.C. §3282 now applies to prosecutions under §1201.

The government contends though, that even though §3282 may apply to current prosecutions under §1201 (brought for violations allegedly committed since 1972), §3281 continues to apply to the instant prosecution for a violation which allegedly occurred before 1972. This contention is based on the general saving clause 1 U.S.C. §109 which reads:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability...

This saving clause has been interpreted to save penalties already imposed on a defendant under the statute

^{3/} In accordance with this position, Judge Bonsal, to whom this case was assigned earlier, denied indigent defendant Harold Konigsberg's request for the appointment of two attorneys under 18 U.S.C. §3005 (Konigsberg Memorandum in Support of Dismissal, page 7).

before it was repealed, Warden v. Marrero, 417 U.S. 653 (1974). It has also been used to preserve earlier penalties for pre-repeal violations, even though imposed after repeal and enactment of more lenient penalty provisions, United States v. Ross, 464 F.2d 376 (2d Cir. 1972), cert. den., 410 U.S. 990, reh. den., 411 U.S. 977 (1973); United States v. Taylor, 123 F. Supp. 920 (S.D.N.Y. 1954), aff'd. 227 F.2d 958 (2d Cir. 1955). In addition, it has been interpreted to sustain post-repeal prosecutions of pre-repeal violations even when the conduct involved was no longer a crime under the new law, United States v. Reisinger, 128 U.S. 398 (1888); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972); contra, Hamm v. Rock Hill, 379 U.S. 306 (1964) (where the Court found that the repeal substituted a right for a crime, and thus reasoned that abatement of both prior prosecutions and convictions was mandated despite §109). None of these situations, however, is presented in the instant case. The 1972 repeal of the death penalty did not change any elements of the substantive offense of kidnapping and the defendants' alleged actions would be violations of both original and amended §1201. No penalty imposed before repeal is sought to be enforced, and the government does not contend that §109 should sustain the imposition^{4/} of the death penalty on any of the defendants now before us.

^{4/} In light of the holdings in Jackson and Furman, such a position would be untenable, since, for the purpose of invalidating a sentence imposing the death penalty under §1201, they would be applied retroactively. See Reed v. United States, 432 F.2d 205 (9th Cir. 1970), cert. den., 401 U.S. 957 (1971); Walker v. Georgia, 408 U.S. 936 (1972); Robinson v. Neil, 409 U.S. 505 (1973).

Rather, the government is asking us to apply §109 to save the pre-repeal version of §1201 solely for the purposes of saving the applicability of the "capital offense" statute of limitations 18 U.S.C. §3281.

Defendants object to this, arguing that the saving clause saves penalties, forfeitures and liabilities incurred under a repealed statute, but does not by its terms save procedures or remedies, and the courts have specifically interpreted §109 as not saving remedies or procedures. United States v. Obermeier, 186 F.2d 243 (2d Cir. 1950), cert. den., 340 U.S. 951 (1951); Bridges v. United States, 346 U.S. 209 (1952); see also United States v. Ross and Warden v. Marrero, both supra. In Obermeier, the Court was faced with the question of whether §109 saved limitation statutes as to past offenses where a new, shorter statute of limitations had been enacted. Judge Frank, in a lengthy historical discussion, noted that when Congress intended to save limitation statutes, it had always enacted separate saving clauses, and that §109 was considered by Congress to save only substantive rights and liabilities, and not procedures or remedies. Although recognizing that the labels "substance," "procedure," and "remedies" have no fixed meanings, Judge Frank found that in the context of the language of the general saving clause, the statute of limitations

... is considered no part of a "right" or "liability," but as affecting the "remedy" only. On that basis, it has been held that, until the expiration of the period named in such a statute, the period may validly be lengthened or shortened by a later statute, and that, where no criminal liability is

involved, the legislature may revive a right barred by a former statute of limitations. In other words--except in the unusual instances where the statute creating a substantive right makes the period of limitations a part or qualification of the right itself--a limitation statute establishes no vested substantive right or unalterable substantive liability. 186 F.2d at 254-255 (footnotes omitted).

Thus the Court there concluded that §109 did not save the repealed statute of limitations.

This analysis was approved by the Supreme Court in Bridges, supra, where the Court considered whether a saving clause similar to §109 applied to a repealed statute of limitation. There the Court concluded that the statute of limitations was beyond the scope of the saving clause, reasoning:

...to interpret the words "rights or liabilities" in the saving clause as including such procedural incidents as the period within which indictments may be found would overlook the practice of Congress to specify the saving of such limitations expressly when and if Congress wished them to be "saved"...346 U.S. at 225.

In the instant case, there has been no direct repeal of any statute of limitation, but a repeal of the penalty provision of §1201 on which the applicability of the no limit statute of limitations §3281 was conditioned. In light of this, the government contends that it is immaterial that §109 does not save repealed statutes of limitations. The government notes that §109 applies when the repeal of a substantive provision of a statute might have "the effect to release or extinguish any penalty, forfeiture or liability incurred under" the old statute. The government reasons that repeal of the substantive death penalty provision of §1201, by making §3281 no longer applicable,

will have the "effect" of releasing a liability incurred under the old statute unless the saving clause applies. Accordingly, the government concludes that §109 should apply to treat the pre-repeal penalty language "as still remaining in force for the purpose of" sustaining the current prosecution by making §3281 applicable.

We think the government's position basically mischaracterizes what is involved here. The clear thrust of 1 U.S.C. §109 is to ensure that substantive penalties or liabilities incurred under a pre-repeal version of a statute not be released by the repeal. In the instant case, the repeal of §1201's death penalty provision had no effect on the substantive elements of the offense of kidnapping and thus affected no substantive liability under the statute. It did change a major element in the penalty provision, though, and normally §109 could be applied to save the old penalty for sentences imposed for offenses committed before repeal. However, since the pre-repeal penalty was held unconstitutional in Jackson, §109 cannot save its application here.^{5/} Thus, the repeal has not released or extinguished any substantive penalty or liability under the old statute.

It has consistently been held that the length of time during which an individual may be exposed to liability under a

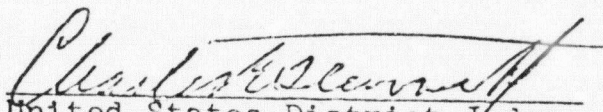
^{5/} This is not altered by the fact that the offenses charged here are pre-Jackson and Furman. See footnote 4, supra.

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statute is not part of the substantive rights or liabilities under the statute. See Obermeier and Bridges, both supra. Accordingly, statutes of limitation designating such periods are not considered "substantive." In this case, the direct effect of the repeal is to terminate the applicability of 18 U.S.C. §3281, the no limit statute of limitations. Thus the "effect" of the repeal has been to extinguish a procedure and remedy previously available to the prosecution under §1201. In light of Bridges and Obermeier, such a procedure and remedy cannot be saved by §109, and thus §109 does not apply in this case.^{6/}

In conclusion, we hold that 1 U.S.C. §109 does not apply to current §1201 for the purpose of preserving the applicability of 18 U.S.C. §3281. We hold that the five-year statute of limitations 18 U.S.C. §3282 does apply and that the instant prosecution is time-barred. Accordingly, we grant defendant's motion and dismiss the indictment in its entirety.

SO ORDERED.


United States District Judge

DATED: New York, N.Y.

October 29 , 1976.

^{6/} Even if §109 could have saved the death penalty for pre-repeal offenses, we doubt that it could save §3281, since this still remains a procedural statute which §109 cannot reach.

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v.
ROBERT ZARINSKY, DEFENDANT-APPELLANT.

Superior Court of New Jersey
Appellate Division

Argued March 16, 1976—Decided July 20, 1976.

SYNOPSIS

Defendant was convicted before the Monmouth County Court of first-degree murder, and he appealed. The Superior Court, Appellate Division, Botter, J. A. D., held that prosecution, which was not instituted within five years from time of offense, was not barred by statute providing that no person shall be prosecuted, tried or punished for any offense not punishable with death unless indictment therefor is found within five years from time of offense; that defendant's right to speedy trial was not violated; that trial judge did not commit prejudicial error in admitting certain evidence; and that any error in charging jury on "lying in wait" was harmless.

Affirmed.

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1. Criminal law \S 28

Capital offenses are those for which death penalty may be imposed.

2. Criminal law \S 145½

Statute of limitations strikes balance between right of accused to repose and right of public to prosecution of crimes, and affords protection against charges brought after events have become clouded by time so as to minimize danger of official punishment because of acts in far-distant past.

3. Criminal law \S 145½

While statute of limitations should be liberally interpreted in favor of repose, its application must be consonant with intent and purpose of lawgiver; it is legislative purpose which controls.

4. Criminal law \S 147

Legislature intended to insure that crimes of most serious class, including first-degree murder, would not escape prosecution by mere passage of time, and phrase "offense *** punishable with death" was convenient means of identifying several offenses to be included in exception for which death penalty was or would be provided in other sections of criminal code, and thus elimination of death penalty did not affect reason for prosecuting such crimes without time restriction. *N. J. S. A. 2A:159-2.*

5. Statutes \S 171

Unenforceability of death penalty did not wipe statute, which provides that, except as otherwise expressly provided, no person shall be prosecuted, tried or punished for any offense not punishable with death unless indictment therefor is filed within five years from time of committing offense, off the books. *N. J. S. A. 2A:159-2.*

6. Homicide \S 354

Imposition of death penalty for murder is not prohibited per se, but criteria for its application may render penalty unenforceable.

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7. Criminal law ¶147

Suspending imposition of death penalty for constitutional reasons afforded no reason for frustrating legislative will by staying additional sanction against murder, namely, relentless prosecution of that crime without limitation in time, and thus statute providing that no person shall be prosecuted, tried or punished for any offense not punishable with death unless indictment therefor is filed within five years from time of committing offense did not bar prosecution in which defendant was charged with first-degree murder and which was instituted after five years from time of alleged offense. *N. J. S. A. 2A:159-2*.

8. Courts ¶91(1)

Defendant's contention that case was wrongly decided by Supreme Court had to be addressed to Supreme Court and not to Superior Court, Appellate Division, which was bound by Supreme Court's decision.

9. Criminal law ¶573

Where, since 17-year-old victim's body was never found, it was necessary for State to allow time to pass so that jury could reasonably infer she had not merely run away, defendant did not demonstrate that prior to his indictment for murder his employment was interrupted, finances drained, associations curtailed, reputation impaired or that he was subjected to anxiety by reason of threat of prosecution for murder, and defendant's claim of possible-prejudice from delay was insubstantial and speculative, defendant's right to speedy trial was not violated by 5½-year delay between his arrest for contributing to delinquency of victim and his indictment for his murder. *U. S. C. A. Const. Amend. 6; Const. 1947; Art. I, par. 10*.

10. Criminal law ¶534(1)

For confession to serve as evidential basis for conviction, State must introduce independent proof of facts and circumstances which strengthen or bolster confession and tend to generate belief in its trustworthiness, plus independent proof of loss or injury.

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11. Homicide \S 228(3)

Failure to produce victim's body did not preclude finding that she was dead.

12. Criminal law \S 563Homicide \S 228(2)

Proof of corpus delicti, the fact of injury or, in a homicide case, of death by criminal agency, may be supplied by direct or circumstantial evidence.

13. Homicide \S 228(3)

Successful concealment or destruction of victim's body should not preclude prosecution of his or her killer where proof of guilt can be established beyond a reasonable doubt.

14. Criminal law \S 532(1)

Voir dire to determine existence of corroboration is not condition precedent to admission of a confession; if sufficient independent corroboration is not shown by all the proofs, judgment of acquittal at close of State's case is appropriate remedy. R. 3:18-1.

15. Criminal law \S 369.2(1)

In determining whether evidence that defendant previously committed crime or civil wrong on specified occasion is admissible, fundamental distinction is between evidence which is relevant only to defendant's criminal disposition and that which is relevant to particular fact in issue before the jury. *Rules of Evidence*, rule 55, N. J. S. A.

16. Criminal law \S 371(1), 372(1)

Evidence of defendant's prior conduct could be admitted if relevant to establish intent, plan or motive even though defendant had been acquitted previously of criminal charge based on such conduct. *Rules of Evidence*, rule 55, N. J. S. A.

17. Criminal law \S 371(1)

In determining whether evidence that defendant previously committed crime or civil wrong on specified occa-

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sion is admissible, conduct which is insufficient to establish criminal intent toward one victim may tend to prove criminal intent toward another victim in light of other evidence. *Rules of Evidence*, rule 55, N. J. S. A.

18. Criminal law §369.2(4)

Witnesses §414(1)

In prosecution for first-degree murder, evidence that defendant, a 28 year-old married man, had on two previous occasions persistently tried to lure teen-age girls into his car, which evidence tended to explain how victim came to be in car of stranger, which tended to negate other hypotheses advanced for victim's disappearance, which was relevant to show defendant's presence in victim's neighborhood and which tended to corroborate identification of defendant as driver of automobile in question, was admissible even though State had previously failed to prove that such prior conduct constituted crime or civil wrong. *Rules of Evidence*, rules 4, 7(f), N. J. S. A.

19. Criminal law §641.2

There is no absolute right to counsel at preindictment lineup.

20. Criminal law §1169.1(5)

In prosecution for first-degree murder, any error in introducing evidence of out-of-court identifications of defendant at lineup held out of presence of defense counsel, who was allegedly notified that lineup would be held but did not appear in time and who was dead at time of trial, was not capable of producing an unjust result where both witnesses made positive in-court identifications of defendant that were not challenged by defendant.

21. Criminal law §339, 1169.1(5)

In prosecution for first-degree murder, permitting in-court identifications of defendant by four witnesses who allegedly saw victim in defendant's automobile was not reversible error where there was nothing to suggest that photo-

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graphic identification procedure was impermissibly suggestive but rather uncontradicted testimony was that each witness was independently shown seven photograph and asked if he could identify driver of automobile; even assuming suggestiveness, witnesses had ample opportunity to observe defendant so that their in-court identifications were based upon their independent recollections.

22. Criminal law §404(4)

In prosecution for first-degree murder, admitting various items seized from defendant's automobile that offered circumstantial evidence of commission of crime was not error although probative weight of many items was debatable, nor was there any error in admitting victim's hair-clips which were found in her pocketbook so that they could be compared with those found in automobile, although pocketbook might have been excluded.

23. Homicide §340(1)

In prosecution for first-degree murder, any error in charging jury on "lying in wait" was harmless since jury could find "lying in wait," which is merely form of premeditated, deliberate and willful murder although traditionally essence of term has consisted of intent to ambush by watchful waiting, concealment and secrecy, despite fact that defendant revealed his physical presence to victim before killing. N. J. S. A. 2A:113-2.

24. Homicide §253(1)

Evidence was sufficient to support defendant's conviction of first-degree murder.

Before Judges KOLOVSKY, BISCHOFF and BOTTER.

Mr. Richard F. Plechner argued the cause for appellant.

Mr. John T. Mullaney, Jr., Assistant Prosecutor, argued the cause for respondent (Mr. James M. Coleman, Jr., Monmouth County Prosecutor, attorney).

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The opinion of the Court was delivered by BORTER, J. A. D. Defendant was convicted in a jury trial of the first degree murder of Rosemary Calandriello (hereafter Rosemary), and the mandatory sentence of life imprisonment was imposed. *N. J. S. A. 2A:113-4; State v. Funicello*, 60 N. J. 60 (1972), cert. den. 408 U. S. 942, 92 S. Ct. 2849, 33 L. Ed. 2d 166 (1972). Defendant's motion for a new trial was denied. On this appeal defendant asserts a number of grounds for reversal of his conviction. He contends that the trial court erred in denying his pretrial motions to suppress evidence seized at his home and to dismiss the indictment on two grounds — that the statute of limitations had run and defendant was denied a speedy trial. Defendant also contends that errors were committed by the trial judge in the admission of evidence and in charging the jury on first degree murder. He contends that his conviction was against the weight of the evidence and that the verdict cannot stand in the face of the State's failure to produce the victim's body. Finding no grounds warranting reversal, we affirm.

On August 25, 1969, at about 6 P.M., Rosemary Calandriello, a 17-year-old high school student, left her home on Center Avenue in Atlantic Highlands, New Jersey, to buy milk and ice pops at two neighborhood stores. She took \$2 with her and when she left she said, "I'll be right back." She was wearing a sleeveless blouse and shorts, was barefooted and carried no purse or wallet. A neighbor saw her walking down Center Avenue toward the center of town. About the same time another neighbor, Mrs. Vaughn, saw a stocky man slouched in an old, black and white Ford automobile parked near a bowling alley on Center Avenue. Shortly thereafter four boys, who were schoolmates of Rosemary, saw her riding with a stocky man, later identified as defendant, in a white Ford Galaxie with a black convertible top. She has not been seen or heard from since, and her body has never been recovered. She was promptly reported to the police as missing and they started an investigation.

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Defendant's identity was determined in the following manner. On August 26 Sergeant Guzzi of the Atlantic Highlands Police Department interviewed the four boys who had seen Rosemary with defendant the night before and they furnished a description of defendant and the vehicle he was driving. Both bore distinctive features. The police learned that two days before Rosemary's disappearance a man fitting defendant's description had attempted to lure two 12-year-old girls, Lydia Hardie and Robin Spangenberg, into his car in Leonardo, a town adjacent to Atlantic Highlands. While the girls were walking down the street at about 7 P.M. a man drove up in a white car with a black convertible roof. He offered them a ride and they refused. Lydia Hardie noted the license plate number, CTI 109. She testified that the man was heavy-set and had long, bushy sideburns and a goatee. She had never seen him before. The girls began to return home when the man approached again. At home Lydia told her mother of the incident and her mother reported it to the police and gave them the license plate number. The girls left home a short time later and the man approached them again and offered them a ride. They refused, but a short time later he returned once more and asked, "Are you sure?" The girls replied, "We're positive," and started to run away. The man said, "What bad little girls you are for not accepting my ride," and he uttered what was described as a "weird laugh."

The police discovered that a man fitting defendant's description had also attempted to lure two 14-year-old girls into his car two weeks earlier at the bowling alley on Center Avenue. The girls were Darlene Curren and Donna Johnson.

Darlene testified that the man had a chubby face, long sideburns and a goatee, and she had never seen him before. At about 7 P.M. he approached them, offered them some drinks in his car and asked Donna if she wanted to drive his car. They refused and went into the bowling alley.

Sergeant Guzzi obtained the license plate number of the car the man was driving and learned that the car was regis-

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tered to defendant's father, with whom defendant and his wife lived, in Linden, New Jersey. Sergeant Guzzi signed a "John Doe" complaint on August 27, 1969 charging defendant with contributing to the delinquency of Rosemary, a minor. It described defendant as "a white male, age early twenties, heavy set with a round chubby face having long bushy sideburns and well trimmed goatee operating a 1961 white Ford Galaxy Convertible." (Defendant's correct age was 28 at the time.) In the late evening of August 27 defendant was arrested at his home in Linden and the automobile was impounded. Defendant was brought to the Monmouth County Jail around midnight. The next morning the four boys identified the vehicle and it was photographed. That same day, August 28, a lineup was held in which the four girls, Donna, Darlene, Lydia and Robin, viewed defendant. Despite the fact that defendant had shaved off his goatee and sideburns after being jailed, he was identified in the lineup as the man involved in the two incidents with these girls.

The automobile was examined pursuant to a search warrant obtained on August 29. The body of the car was in poor condition, the left rear was dented and the rear window was down. There was mud underneath the car and pieces of straw, a twig and grass were found on the lower front portions of the car. In the glove compartment were bottles of beer and blackberry brandy. The police found a .22-caliber rifle shell and a blank casing under the back seat. Hair ties were found under the right front seat and a pair of blue bikini-type panties were on the left rear floor. (There was testimony that Rosemary had worn hairclips and panties of this type, but these items were not identified as actually belonging to her.) In the trunk were found a chrome-plated hatchet and a ball peen hammer with a hair fiber on its flat face. Scrapings taken from the right rear bumper and right rear taillight rim proved upon analysis to be blood.

The door and window handles on the passenger side of the vehicle had been removed and were found under the right

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front seat. The door and window worked properly when the handles were attached, but the holding locks on these handles had been removed. Without a handle the door on the passenger's side could not be opened from the inside, but the door and window handles on the driver's side were intact.

The initial complaint against defendant was amended on August 28 to charge defendant with abduction of Rosemary for an immoral purpose. *N. J. S. A. 2A:86-3*. Defendant was released on bail on August 28, 1969. Thereafter, in November 1969, defendant was indicted and arrested for attempted kidnapping or enticing a child away from parents (*N. J. S. A. 2A:118-2*) in connection with the incident involving the two 12-year-old girls, Lydia and Robin. He was held at the Monmouth County Jail from November 22, 1969 until December 19, 1969, when he was released on bail. During this time his jailmates included Herbert L. Williams, John Gosch and Al Glover.

In December 1969 defendant was also indicted in connection with the August 9, 1969 incident involving the 14-year-old girls, Darlene and Donna. The crimes charged were an attempt to entice a child "within the age of 14 years" to leave her father or mother, contrary to *N. J. S. A. 2A:118-2*, and an attempt to impair the morals of a minor by offering the minor alcoholic beverages, allegedly in violation of *N. J. S. A. 2A:96-3*.

In March 1970 defendant was tried on the indictment involving the 12-year-old girls, but the case was dismissed by the trial judge at the close of the State's proofs. In the subsequent trial involving the 14-year-old girls, defendant was convicted of attempting to commit the alleged crimes. However, on appeal, this court in February 1971 set aside the convictions on the ground that the proofs did not support the charges. In the meantime, in June 1970, the complaint charging abduction of Rosemary was dismissed by the trial court on defendant's motion pursuant to *R. 3:25-3* for unnecessary delay in presenting the charge to a grand jury. A

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consent order was also entered returning the impounded vehicle to defendant's father.

Although no charges were pending after June 1970, investigations involving defendant continued. Warrants were issued in February 1975 for the search of defendant's residence and vehicles, supported by affidavits asserting that defendant was a suspect in the deaths of Rosemary and of 17-year-old Linda Balabanow in 1969, and teenagers Joanne Delardo and Doreen Carlucci in December 1974. Linda Balabanow had worked at a drug store two blocks from defendant's home. She was last seen when she left the store on March 26, 1969, and her body, to which an eight-foot truck tire chain was attached, was recovered from the Raritan River in Woodbridge Township on April 27, 1969. She had been brutally beaten and was killed before her body entered the water. A piece of electrical wire was found knotted around her broken neck. In January 1972 Sergeant Guzzi was advised that federal authorities had matched a hair sample from the Balabanow girl with the hair fiber found on the ball peen hammer taken from the trunk of defendant's car in the investigation of Rosemary's death.

Similarities were noted between the death of the Balabanow girl and the deaths of the Delardo and Carlucci girls of Woodbridge Township, who were together when last seen alive on December 13, 1974. Their bodies were found on December 27 in Manalapan Township. Both girls had been strangled, and knotted electrical wire was found on Joanne Delardo's neck. The Balabanow and Delardo bodies were nude from the waist down, and Carlucci's body was almost entirely nude. Their missing clothing was never found. The preserved state of Delardo's and Carlucci's bodies led police to suspect that they had been stored in cool temperature for more than a week before being deposited in Manalapan. Defendant had an insulated truck which he and his father used in their produce business which could have been used for this purpose. However, the searches conducted on February

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21, 1975 for evidence of these crimes were not productive so far as the record before us shows.

On February 20, 1975 defendant was indicted for the murder of Rosemary Calandriello. His pretrial motions to dismiss the indictment for untimeliness were denied, and his motion to suppress evidence seized in the February 1975 searches was also denied. Trial commenced on April 7, 1975.

As indicated above, the evidence offered by the State probative of defendant's guilt was largely circumstantial. There was extensive evidence linking defendant to Rosemary's disappearance. Two of the girls testified to the August 9 and August 23 incidents in which defendant tried to entice them into his automobile and they made positive in-court identifications of defendant. The four boys who observed Rosemary in defendant's car when she was last seen also testified and made positive in-court identifications of defendant. Theirs was not merely casual observations of Rosemary and defendant. They were approaching the intersection of Center Avenue and Avenue A in Atlantic Highlands when they observed defendant's automobile coming toward them. The vehicle turned left in front of them and they followed it at a slow pace for about five minutes. Each testified that he was able to get a good view of Rosemary and defendant, and one estimated he had a front view of defendant's face for 10 to 12 seconds. They were surprised to see Rosemary in defendant's automobile, for Rosemary had no boyfriends to their knowledge.

There was much evidence to show that it was out of character for Rosemary to be in a stranger's car. She was a shy, quiet and obedient girl who got along well at home and was never known to have hitchhiked. Rosemary had gone out with one boy several times, beginning in July 1969, but only on a double date. There was no evidence offered to suggest that Rosemary had voluntarily run away from home, yet she was never seen or heard from after riding in defendant's car. By stipulation it was proved that the following government agencies had no contact with Rosemary since August

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25, 1969: the Social Security Administration, Internal Revenue Service, United States Post Office, Atlantic Highlands Board of Health, New Jersey Division of Motor Vehicles and New Jersey Unemployment Bureau.

Finally, three of defendant's jailmates, John Gosch, Herbert L. Williams and Al Glover, testified to statements made by defendant while in the Monmouth County Jail. Defendant implicated himself in Rosemary's murder in talking with Gosch (saying, "They'll never find that stinking broad") and, in an angry outburst, defendant admitted to Williams and Glover that he had thrown Rosemary's body, loaded with weights, into a river. Williams also testified that defendant alluded to various details of the case. Defendant explained that the inside door handles of his car were removed so that girls could not get out, and he said that he could claim that a pair of panties, found by the police in his car, were his wife's. There was also evidence that shortly before his arrest defendant was observed leaning over the open trunk of the Ford automobile with a scrub brush in his hand and a plastic pail beside him. Despite this suggestion that defendant was cleaning a portion of the vehicle, it was found generally in an unclean and untidy condition.

Defendant did not testify. Various witnesses, including his wife, mother and father and several aunts and uncles, testified that defendant was at home in Linden, New Jersey throughout the evening of August 25, 1969. However, the State was able to contradict the testimony of defendant's wife, mother and father. Defendant's father claimed he had been watching television during the evening and defendant's wife claimed she was at home. However, when questioned the day after defendant's arrest his father had said nothing about watching television; rather, he told the police he went to sleep at 5:30 P.M. At the same time defendant's mother had stated that defendant's wife had accompanied her to her weekly bingo game on the night of Rosemary's disappearance.

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The defense also attempted to counter the State's evidence in other respects. Defendant's wife explained that the handles in the car had been removed in an effort to repair a jammed window, that defendant was never able to install them securely and, therefore, they were kept under the seat. She also testified that the blue panties found in the car were hers, as were the hair clips. An explanation was also offered for the blood on the rear of the car: the brother of defendant's wife attempted to repair the taillight three weeks earlier and had cut his hand.

Despite this testimony the jury found defendant guilty.

I

We consider, first, whether defendant's prosecution is barred by N. J. S. A. 2A:159-2. That provision states:

Except as otherwise expressly provided by law no person shall be prosecuted, tried or punished for any offense not punishable with death, unless the indictment therefor shall be found within five years from the time of committing the offense or incurring the fine or forfeiture. This section shall not apply to any person fleeing from justice. [Emphasis supplied]

Defendant argues that because the death penalty can no longer be imposed under our existing statutes (*State v. Funicello, supra*) he was not accused of a crime "punishable with death." Therefore, he reasons, this prosecution must be barred because it was not instituted within five years from the time of the offense.

[1] Defendant places primary reliance on *State v. Johnson*, 61 N. J. 351 (1972), which held that subsequent to *Funicello* an individual charged with first degree murder was bailable before conviction because murder was no longer a capital offense. However, we do not find *Johnson* persuasive on the issue before us. In *Johnson* the court was concerned with the right to bail. N. J. Const. (1947), Art. I, par. 11, provides that all persons are entitled to bail before conviction "except for capital offenses when the proof is evident or presumption great." Capital offenses are those

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for which the death penalty may be imposed. *State v. Johnson, supra*, 61 N. J. at 355; *State v. Williams*, 30 N. J. 105, 125 (1959).

The court in *Johnson* examined the policies underlying the right to bail. Noting that the concept of pretrial release reflects "the everpresent presumption of innocence," the court said that the inclusion of the words "except for capital offenses" struck a balance:

The underlying motive for denying bail in capital cases was to secure the accused's presence at the trial. In a choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers . . . felt that an accused would probably prefer the latter. But when life was not at stake and consequently the strong flight-urge was not present, the framers obviously regarded the right to bail as imperatively present. [61 N. J. at 355]

Once the threat of death and its strong inducement for flight were removed the court found that there was no longer any justification for denying bail to persons accused of crimes which had been designated by the Legislature as capital offenses.

[2] A statute of limitations strikes a balance between the right of the accused to repose and the right of the public to the prosecution of crimes. It affords protection against charges brought after events have become clouded by time. "to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U. S. 112, 114-115, 90 S. Ct. 858, 860, 25 L. Ed. 2d 156, 161 (1970). For most crimes there is an absolute bar to prosecution after a specified period. *In re Pillo*, 11 N. J. 8, 18 (1952); *Moore v. State*, 43 N. J. L. 203, 209 (E. & A. 1881). However, the Legislature made an exception for crimes "punishable with death." These extremely serious crimes were never to be insulated by time.

Since it was enacted in 1796 our statute of limitations has excepted crimes "punishable with death." *Pat. L.* 1796, p. 208; *Moore v. State, supra*, 43 N. J. L. at 204. Amendments in 1879 (*L.* 1879, p. 183) and 1953 (*L.* 1953, c.

204, § 1) did not change that language. Throughout this period, of course, the death penalty was in effect. Thus, the Legislature pursued two sanctions for first degree murder: (1) that its perpetrator may suffer the death penalty and (2) that the crime would not go unpunished because of the lapse of time between the murder and the indictment.

[3, 4] While a statute of limitations should be liberally interpreted in favor of repose, its application must be consonant with the intent and purpose of the lawgiver. It is the legislative purpose which controls. *State v. Brown*, 22 N. J. 405, 415-416 (1956). Clearly, the Legislature intended to ensure that crimes of the most serious class, including first degree murder, would not escape prosecution by the mere passage of time. The phrase "offense * * * punishable with death" was a convenient means of identifying the several offenses to be included in the exception for which the death penalty was or would be provided in other sections of the criminal code. See N. J. S. A. 2A:113-2 and N. J. S. A. 2A:113-4 (first degree murder); N. J. S. A. 2A:118-1 (kidnapping for ransom); N. J. S. A. 2A:148-6 (assault with intent to kill the President, a state governor or other high executive officers) and N. J. S. A. 2A:148-1 (treason; but note the three-year statute of limitations for treason in N. J. S. A. 2A:159-1). The fact that the death penalty cannot be carried out, for constitutional reasons does not change this identification and purpose. Unlike *Johnson*, the elimination of the death penalty has not affected the reason for prosecuting these crimes without time restriction. Their heinous nature remains.

[5-8] The unenforceability of the death penalty has not wiped the statute off the books. See *Dwyer v. Volmar Trucking Corp.*, 105 N. J. L. 518, 520 (Sup. Ct. 1929). Imposition of the death penalty for murder is not prohibited *per se*, but the criteria for its application may render the penalty unenforceable. See *Gregg v. Georgia*, — U. S. —, 96 S. Ct. 2909, 48 L. Ed. 2d —, 44 U. S. L. W. 5230 (1976). The constitutional basis for suspending the

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application of the death penalty — to avoid an excessive, inappropriate or cruel and inhuman punishment or its arbitrary and capricious application (see *id.*) — are unrelated to the purposes of our statute of limitations. It is one thing to suspend the imposition of the death penalty for constitutional reasons, but this affords no reason for frustrating the legislative will by staying its additional sanction against murder, namely, the relentless prosecution of that crime without limitation in time. Thus, we conclude that N. J. S. A. 2A:159-2 does not bar this prosecution.¹

II

[9] Defendant next contends that his right to a speedy trial, protected by the Sixth Amendment to the United States Constitution,² was violated. A 5½-year period separated defendant's arrest for contributing to the delinquency of Rosemary Calandriello and his indictment for her murder. Nevertheless, in the circumstances of this case, we hold that defendant's right to a speedy trial was not violated.

In reaching this decision we have considered the various factors referred to in *Barker v. Wingo*, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and *State v. Szima*, 70 N. J. 196, 358 A. 2d 773 (1976). These are the length of delay, the reason for delay, whether defendant asserted the right and the degree of prejudice to defendant.

¹We note defendant's further argument that *State v. Brown*, *supra*, was wrongly decided by our Supreme Court. There a conviction for second degree murder was upheld where the indictment charging first degree murder was returned more than five years after commission of the crime. Defendant's contention may be addressed to the Supreme Court, not this court, since we are bound by that decision. *State v. Sczjanelli*, 133 N. J. Super. 512, 514 (App. Div. 1975). In any event, it is irrelevant where the accused is found guilty of first degree murder.

²The Sixth Amendment right to speedy trial is applicable to the states. *Klopfer v. North Carolina*, 386 U. S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). The right is also protected by N. J. Const. (1947), Art. 1, par. 10.

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The State offers a reasonable explanation for the delay in this case. Because Rosemary's body was never found the State was forced to prove her death by circumstantial evidence. In order to do this convincingly it was necessary to allow time to pass so that a jury could reasonably infer that she had not merely run away. Moreover, it was not unreasonable for the State to hope that more positive evidence would be found before trying defendant for this ultimate crime.

Defendant was first arrested in connection with Rosemary's disappearance in August 1969, but charges of abduction were dropped in June 1970. He was released on bail promptly after his arrest in August 1969. He has not demonstrated that prior to his indictment for murder his employment was interrupted, his finances drained, his associations curtailed, his reputation impaired, or that he, his family and friends were subjected to anxiety by reason of the threat of prosecution for murder. These considerations were identified in *United States v. Marion*, 404 U. S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, 478 (1971), as the "substantial underpinnings" of the right to speedy trial. Cf. *State v. Smith*, 131 N. J. Super. 354, 369 (App. Div. 1974), aff'd o. b. 70 N. J. 213 (May 17, 1976); *United States v. MacDonald*, 531 F. 2d 196 (4 Cir. 1976).

Prejudice to a defense due to inordinate delay in prosecution is, of course, a serious consideration. However, we find no reason on this account to invalidate defendant's conviction. There is nothing in the record to indicate that his defense was unduly impaired. See *Barker v. Wingo*, *supra*, 407 U. S. at 532, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118. Defendant's alibi witnesses testified they had a clear memory that defendant was home on the night in question. See *id.* at 532, 92 S. Ct. at 2193, 33 L. Ed. at 118. The original, early charge of abduction had served to stimulate defendant's preparation of a defense against criminal involvement with Rosemary. Thus, defendant's claim of possible prejudice is "insubstantial" and "speculative."

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United States v. Ewell, 383 U. S. 116, 122, 86 S. Ct. 773, 777, 15 L. Ed. 2d 627, 632 (1966); cf. *United States v. Mann*, 291 F. Supp. 268 (S. D. N. Y. 1968) (cited with approval in *Barker v. Wingo*, *supra*).

Defendant contends that he was prejudiced by reason of the death of his first attorney, Morris Spritzer, whose testimony would have been helpful on the *voir dire* as to the admissibility of the lineup evidence. The record shows that Spritzer represented defendant in an application for reduction of bail on November 24, 1969 in connection with the indictment pertaining to the 12-year-old girls. Shortly thereafter, on December 11, 1969, defendant's present attorney appeared for defendant in that cause and he has continued to represent defendant on all charges involving Rosemary and the four other young girls. Defendant contends that he was deprived of his right to Spritzer's counsel at the August 28, 1969 lineup identification. However, for reasons indicated below, we conclude that the loss of Spritzer's testimony was immaterial, since the denial of defendant's right to counsel, even if it occurred, was harmless error.

We also find no prejudice in the loss of other potential evidence claimed by defendant. For example, the Ford Galaxie, which was ordered returned to defendant's father in May, 1970, was destroyed in April 1973 as valueless. However, photographs of the vehicle were taken in August 1969 and were marked in evidence at the trial. The car was available to defendant before the charge of abducting Rosemary had been dismissed, and defendant has not shown what proof he lost by its unavailability at the time of trial.

Defendant contends that his motion for dismissal of the charges against him for Rosemary's abduction was tantamount to a request for speedy trial.³ Cf. *State v. Smith*,

³There is no merit to defendant's collateral estoppel claim that dismissal of the abduction charges bars the State from asserting that defendant was not prejudiced by the delay. See *State v. Redinger*, 64 N. J. 41, 45-46 (1973).

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supra, 131 N. J. Super, at 363-367. Nevertheless, viewing the record as a whole, we have no doubt that defendant suffered no constitutional wrong by the passage of time before he was indicted for murder.

III

We reject, also, defendant's contentions that the trial judge committed prejudicial error in admitting certain evidence.

[10] We find no error in the judge's refusal to exclude defendant's admissions of culpability to Gosch, Williams and Glover. For a confession to serve as an evidential basis for conviction "the State must introduce independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness, plus independent proof of loss or injury * * * ." *State v. Lucas*, 30 N. J. 37, 56 (1959). We find that the State has met this burden.

[11-13] There was ample independent circumstantial proof to give credence to defendant's admissions. The failure to produce the victim's body does not preclude a finding that she is dead. *Commonwealth v. Burns*, 409 Pa. 619, 629-33, 187 A. 2d 552, 553-559 (Sup. Ct. 1963); *State v. Dudley*, 19 Ohio App. 2d 14, 20, 249 N. E. 2d 536, 541 (Ct. App. 1969). Proof of the *corpus delicti* — the fact of injury or, in a homicide case, of death, by a criminal agency — may be supplied by direct or circumstantial evidence. *Commonwealth v. Burns*, *supra*; *State v. Dudley*, *supra*; *Campbell v. People*, 159 Ill. 9, 42 N. E. 123 (Sup. Ct. 1895) (miscited by defendant as support for his position); *People v. Corrales*, 34 Cal. 2d 426, 240 P. 2d 843 (Sup. Ct. 1949); cf. *United States v. Di Orio*, 150 F. 2d 938, 941 (3 Cir.), cert. den. 326 U. S. 771, 66 S. Ct. 175, 90 L. Ed. 465 (1945). *Contra*, *Ruloff v. People*, 18 N. Y. 179 (Ct. App. 1858), cited by defendant, and N. Y. Penal Law of 1909, § 1041. But L. 1965, c. 1046, § 2, effective Sept. 1, 1965 (N. Y. Penal Code

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§ 500.05 (McKinney 1967)), repealed the 1909 statute. New York law now bars a conviction based solely on a confession unless there is "additional proof that the offense charged has been committed." N. Y. Crim. Proc. L. § 60.50 (L. 1970, c. 996, § 1, effective Sept. 1, 1971). See *People v. Jennings*, 40 A. D. 2d 357, 340 N. Y. S. 2d 25 (App. Div.), aff'd o.b. 33 N. Y. 2d 880, 352 N. Y. S. 444, 307 N. E. 2d 561 (Ct. App. 1973); cf. *People v. Daniels*, 37 N. Y. 2d 624, 376 N. Y. S. 2d 436, 339 N. E. 2d 139 (Ct. App. 1975). Surely, the successful concealment or destruction of the victim's body should not preclude prosecution of his or her killer where proof of guilt can be established beyond a reasonable doubt. *Campbell v. People*, supra, 159 Ill. at 22, 42 N. E. at 127.

[14] Contrary to defendant's contention, a *voir dire* to determine the existence of corroboration is not a condition precedent to the admission of a confession. If sufficient independent corroboration is not shown by all the proofs, a judgment of acquittal at the close of the State's case is the appropriate remedy. R. 3:18-1.

[15-17] Defendant next contends the trial judge erred in admitting the testimony of Lydia Hardie and Darlene Curren as to defendant's attempts to entice them into his car. We disagree.

Evid. R. 55 provides:

Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed a crime or civil wrong on another specified occasion but, subject to Rule 48, such evidence is admissible to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident.

The fundamental distinction is between evidence which is relevant only to a defendant's "criminal disposition" and that which is relevant to a particular fact in issue before the jury. *State v. Wright*, 66 N. J. 466 (1975), adopting dissenting opinion, 132 N. J. Super. 130, 148 (App. Div.

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1974). Evidence of defendant's prior conduct may be admitted if relevant to establish intent, plan or motive (see *State v. Sinnott*, 24 N. J. 408, 413-414 (1957)) even though defendant had been acquitted previously of criminal charges based upon such conduct. *State v. Slocum*, 130 N. J. Super. 358, 363 (App. Div. 1974). Conduct which is insufficient to establish a criminal intent toward one victim may tend to prove a criminal intent toward another victim in the light of other evidence.

[18] Defendant contends that the State's failure to prove that his prior conduct was a crime or civil wrong prevents admission of this evidence. This contention misses the point. If the prior conduct is not a crime or civil wrong, but is relevant it is admissible. *Evid. R. 7(f)* provides that "all relevant evidence is admissible" unless excluded under some other rule of evidence. Here we find no abuse of discretion in the failure to exclude this evidence under *Evid. R. 4* because of its potential for prejudice.

In this case evidence that defendant, a 28-year-old married man, had on two previous occasions persistently tried to lure teenage girls into his car would tend to explain how Rosemary came to be in the car of this stranger. See *State v. Wright*, *supra*. It tends to negate other hypotheses advanced by defendant for Rosemary's disappearance, namely, voluntary flight, suicide or accident.

We also agree with the trial judge's observation that the evidence was relevant to show defendant's presence in the victim's neighborhood, despite his residence in another county, and it tended to corroborate the identification of defendant as the driver of the automobile.⁴

⁴Defendant's assertion that the trial judge did not caution the jury as to the proper consideration of this evidence (*Evid. R. 6*) is directly contradicted by the transcript of the judge's charge to the jury. Moreover the judge did not abuse his discretion in refusing to give a limiting instruction after the prosecutor's summation but before the jury was excused for the day. Finally, there is no merit to the complaint that the prosecutor committed prejudicial error in referring

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[19] Similarly, we reject defendant's argument that admission into evidence of the out-of-court identifications of defendant by Lydia Hardie and Darlene Curren was reversible error. The identification of defendant as the man who tried to lure the girls into his automobile was made at a lineup on August 28, 1969, one day after defendant was arrested in connection with Rosemary Calandriello's disappearance. There is no absolute right to counsel at a pre-indictment lineup. *Kirby v. Illinois*, 406 U. S. 6, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); *State v. Earle*, 60 N. J. 550, 552 (1972). Defendant argues, however, that because the police knew he had retained counsel and held the lineup out of counsel's presence, the identifications were inadmissible. See *State v. Wilbely*, 112 N. J. Super. 216, 219 (App. Div. 1970).

[20] At the *voir dire* held to determine the admissibility of this evidence there was testimony that the police did notify counsel that the lineup would be held, but that he did not appear in time. Counsel was dead at the time of this trial and no explanation was given for his absence from the lineup.⁶ In any case, both witnesses made positive in-court identifications of defendant, which are not challenged by defendant. Thus, even if there was error, we are satisfied beyond a reasonable doubt that introduction of this evidence was not "clearly capable of producing an unjust result." *R. 2:10-2*; *Chapman v. California*, 386 U. S. 18, 23-24, 87 S. Ct. 824, 827-828, 17 L. Ed. 2d 705, 710 (1967); *State v. Macon*, 57 N. J. 325, 336-341 (1971).

[21] Further, the trial judge did not err in permitting in-court identifications of defendant by the four witnesses who saw Rosemary in defendant's automobile. The judge had previously ruled that their identifications of defendant's

to this evidence in his summation. See *State v. Slobodian*, 120 N. J. Super. 68, 75 (App. Div.), certif. den. 82 N. J. 77 (1972).

⁶The trial judge made no finding as to who was responsible for counsel's absence, reasoning that defendant had no right to counsel under *Kirby v. Illinois* and *State v. Earle*, *supra*.

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photograph should not be presented to the jury because the State had failed to properly preserve evidence of the photographic identification. See *State v. Brown*, 99 N. J. Super. 22, 27-28 (App. Div.), certif. den. 51 N. J. 468 (1968). However, there is nothing in the record to support defendant's contention that the procedure was impermissibly suggestive. On the contrary, the uncontradicted testimony was that each witness was independently shown seven photographs and asked if he could identify the driver of the automobile.

Assuming, *arguendo*, there was suggestiveness in the procedure, it was clear that the boys had ample opportunity to observe defendant. Thus, we have no doubt that the trial court correctly concluded that these in-court identifications were based upon their independent recollections. See *Simmons v. United States*, 390 U. S. 377, 384-386, 88 S. Ct. 967, 971-72, 19 L. Ed. 2d 1247, 1253-1254 (1968); *State v. Thompson*, 59 N. J. 396, 418-419 (1971); cf. *Neil v. Biggers*, 409 U. S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

[22] We find no error in admitting into evidence various items seized from defendant's automobile which offered circumstantial evidence of the commission of the crime, although the probative weight of many items was debatable. *State v. Wade*, 89 N. J. Super. 139, 145 (App. Div. 1965); cf. *State v. Mayberry*, 52 N. J. 413, 435-436 (1968), cert. den. 393 U. S. 1043, 89 S. Ct. 673, 21 L. Ed. 2d 593 (1969). The trial judge did not err in concluding that the State had met its burden in establishing the chain of possession of the items. See *State v. DiCarlo*, 67 N. J. 321, 329 (1975); *State v. Brown*, *supra*, 99 N. J. at 27. Nor was there error in the admission of hairclips used by Rosemary which had been found in her pocketbook, so that they could be compared with those found in the car. While the pocketbook might have been excluded, this claimed error could not justify setting aside the verdict.

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IV

We find defendant's remaining contentions lacking in merit.

[23] N. J. S. A. 2A:113-2 defines murder "perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing" [emphasis supplied] as murder in the first degree. That the trial judge charged "lying in wait" was not reversible error in the circumstances of this case.

The State contends that defendant's course of conduct, reasonably inferable from the evidence, was tantamount to concealment within the meaning of the law. The removal of the door and window handle for example, evidenced concealment of defendant's purpose to entrap the victim. See *State v. Tansimore*, 3 N. J. 516, 537 (1950). A jury could find "lying in wait" despite the fact that an accused has revealed his physical presence to the victim immediately before the killing. *Id.* Traditionally, however, an intent to ambush by watchful waiting, concealment and secrecy is the essence of the term. *People v. Merkouris*, 46 Cal. 2d 540, 297 P. 2d 999 (Sup. Ct. 1956). However, a killing by "lying in wait" is merely a form of premeditated, deliberate and willful murder. See N. J. S. A. 2A:113-2. Here, the jury must have found defendant guilty of a deliberate, premeditated and willful murder. Thus we are satisfied that in the circumstances of this case the jury could not have been misled by the charge and, if there was error, it was harmless beyond a reasonable doubt. See *Commonwealth v. Mondollo*, 247 Pa. 526, 93 A. 612 (Sup. Ct. 1915); cf. *Turner v. United States*, 396 U. S. 398, 420, n. 41, 90 S. Ct. 642, 654, n. 41, 24 L. Ed. 2d 610, 625, n. 41 (1970).

Defendant also contends that the search warrants issued in 1975 were not supported by affidavits establishing probable cause to believe that defendant was guilty of any of the murders for which evidence was sought. We disagree. Nor was it unreasonable to believe that evidence of such crimes may

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have been concealed in defendant's home or vehicles. Moreover, not only has defendant failed to demonstrate any prejudice resulting from the searches, he has not even asserted that any of the seized items were admitted in evidence.

[24] Finally, we find no merit to defendant's assertion that his conviction was against the weight of the evidence. A motion for a new trial on this ground was denied. We are satisfied that "the evidence, viewed in its entirety including the legitimate inferences therefrom [was] sufficient to enable a jury to find that the State's charge [was] established beyond a reasonable doubt." *State v. Mayberry, supra*, 52 N. J. at 436-437. Thus, we have no doubt that defendant's conviction was not a "manifest denial of justice under the law." *State v. Sims*, 65 N. J. 359, 374 (1974).

Affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK----- x
UNITED STATES OF AMERICA, :

- v - :

ANTHONY PROVENZANO, :
SALVATORE BRIGUGLIO, :
HAROLD KONIGSBERG, and :
GEORGE VANGELAKOS, :NOTICE OF APPEAL

76 Cr. 580 (CES)

Defendants. :
----- x

NOTICE is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the decision and order of United States District Judge Charles E. Stewart, Jr., dismissing the indictment entered in this case on the 29th day of October, 1976.

Dated: New York, New York

November , 1976

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